86-1171

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1986

No. _____

LOUIE L. WAINWRIGHT, etc., et al,

Petitioners,

v.

RICHARD T. DORMAN

Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

AND APPENDIX

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QUESTIONS PRESENTED

I.

Whether a federal court should excuse a procedural default in state court occationed by a habeas petitioner's voluntary dismissal of his appeal while acting as his own counsel after a seven month delay in the preparation of the transcript of his trial in order to pursue a collateral remedy which he had mistakenly concluded could afford him the relief he would have been seeking on direct appeal where he makes no showing of his factual innocence?

II.

Whether the Court of Appeals erroneously applied the "voluntary relinquishment of a known right or privilege" formulation of Johnson v. Zerbst, 304 U.S. 458, 464 (1938) in deciding whether petitioner had "deliberately bypassed" an available state remedy when he voluntarily dismissed his appeal in state court on the mistaken assumption that a collateral attack could bring him earlier relief using a standard

that required the state to demonstrate both an "intentional relinquishment of a right and the benefit of a tactical advantage by such relinquishment on the premise that Fay v. Noia, 372 U.S. 391 (1963) requires nothing less?

PARTIES TO THE PROCEEDING

Petitioners in this action are LOUIE L. WAINWRIGHT, Secretary, Florida Department of Corrections and Bob Butterworth, Attorney General of the State of Florida. The only Respondent is named in the caption.[1]

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[1] Bob Butterworth is a successor to Jim Smith as Attorney General of the State of Florida and is named in accordance with the provisions of Rule 40.3.

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OPINION BELOW

The decision of the court below is reported as Dorman v. Wainwright, 798 F.2d 1358 (11th Cir. 1986) (A.5-52).

JURISDICTIONAL STATEMENT

This court has jurisdiction to review the decision of the Court of Appeals on petition for certiorari under 28 U.S.C. § 1254(1). The court below decided this case September 9, 1986 (A.5) Petitioners filed a Petition for Rehearing (A.2-4). The court below denied that petition October 18, 1986 (A.1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. XIV Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein

they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28 U.S.C. §2254(a) provides:

"(a) The Supreme Court, a justice thereof, a circuit judge or a District Court shall entertain an application for a Writ of Habeas Corpus in behalf of a person in custody pursuant to the judgment of a State Court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

The state charged respondent with second degree grand theft in an information filed in January of 1978 (A.10). The state court appointed the public defender to represent him. The assistant public defender assigned to his case was Terry Rogers (A.11). Petitioner filed various pro se motions with the court while represented by Rogers indicating a desire to discharge Rogers and purporting to act as his own counsel although he had never been given leave of court to do so (A.11,12). There was no evidence he ever asked Rogers to file a motion to withdraw on the ground that he wished to proceed pro se. He eventually filed a civil suit against the Office of the Public Defender to create a conflict of interest (A.20,n.2). The state court allowed the public defender's office to withdraw (A.12).

After the withdrawal of the Office of

the Public Defender, the trial court appointed attorney Wayne Timmerman to represent respondent (A.13,37,57,81-82). After Timmerman's appointment, respondent ceased filing pro se pleadings until after trial (A.27). He went to trial and that trial resulted in a conviction (A.9,14).

Respondent filed a pro se notice of appeal (A.14). The state court appointed attorney Wayne Chalu to represent respondent on appeal (A.14). Chalu filed an amended notice of appeal on respondent's behalf (A.14). Respondent purported to discharge Chalu from representing him on appeal (A.15). Chalu, nevertheless, continued representing respondent until he filed a motion seeking to dismiss his appeal to pursue collateral remedies (A.16). He had been informed by a fellow inmate who had formerly been a state court judge to raise his state speedy trial claim by a collateral attack (A.16). The

Florida Court of Appeals granted respondent's motion to dismiss his appeal (A.16).

Respondent then sought collateral relief in the state trial court on grounds he could have raised on his direct appeal (A.17). The state trial court denied relief on the ground that the claim should have been presented on direct appeal (A.17). Respondent appealed this ruling to the state appellate court and it affirmed (A.17). Respondent then turned his attention to the federal district court (A.17). His claim in that case was that the state had denied him his right to a direct appeal (A.18,67). In that case, the magistrate reasoned that he had dismissed the appeal because of his desire to pursue collateral relief not because of the delay in the preparation of the transcript of his trial (A.70). So finding, he ruled respondent's "failure to secure an

appeal was attributable solely to his own action in dismissing his appeal" (A.71). The district court adopted the magistrate's report and recommendation in its entirety (A.65,66). Neither respondent nor petitioners appealed the district court's ruling.

Shortly after the dismissal of respondent's first federal habeas petition, he filed two more petitions in the district court (A.19). The magistrate ordered these petitions consolidated (A.19). These are the petitions that give rise to the instant action. Petitioner raised his claim that he was denied the right to proceed pro se in these petitions. Petitioner responded to both pointing out that respondent had deliberately by passed his state remedy and that he was procedurally barred from seeking further relief in state court on account of his dismissal of his direct

appeal (A.21,22,78). The magistrate ordered an evidentiary hearing on respondent's self-representation claim (A.23,95).

The magistrate's report and recommendation found that respondent had "failed to satisfy his burden of proof that he was forced to accept representation of counsel or that he voluntarily and intelligently elected to defend himself without counsel." (A.25,97). And, it found that "[a]t no time, at the trial court level, did he waive his right to appointed counsel." (A.25.97). The report and recommendation did not address either the deliberate bypass or the procedural default which resulted from it (A.95-98). Without a further evidentiary hearing, the district court rejected the magistrate's report and recommendation and granted respondent relief on his self-representation claim (A.25-27,85-94).

Petitioners moved the district court for rehearing and to alter or amend judgment urging, inter alia, both respondent's deliberate bypass and the fact that he had neither pled nor shown cause or prejudice to excuse the procedural default occationed by the dismissal of his appeal (A.28,62-84). The district court entered an order denying the motion which addressed both the deliberate bypass issue and the petitioner's claim of the applicability of a Wainwright v. Sykes, 433 U.S. 72 (1977) bar to relief.

The district court relied on Buckelew v. United States, 575 F.2d 515 (5th Cir. 1978) in rejecting petitioners' deliberate bypass argument finding that subjective intent and whether there was a tactical advantage to be gained were proper consideration in the determination of whether there had been a showing of deliberate bypass (A.29,54). Then, it rejected the

petitioners' Sykes argument relying on the "miscarriage of justice" language in Huffman v. Wainwright, 651 F.2d 347 (5th Cir.), reh. en banc denied, 657 F.2d 1251 (1981), reasoning that Sykes had only limtied Fay to prohibit "sandbagging." (A.29-30,54-56). Then it found respondent had demonstrated cause in the incorrect advice he had received from his jailhouse consultant (A.55). And, it found prejudice "in that the clear constitutional right of self-representation and whatever benefits flowing therefrom were deprived in this instance." (A.55).

After securing a stay of the district court's order, petitioners appealed to the court below (A.28). In an opinion by Garza for a panel including both Johnson and Anderson, the court affirmed the granting of habeas relief to respondent (A.5-52).

In addressing the deliberate bypass

issue the court rejected petitioners' argument that Schneckloth v. Bustamonte, 412 U.S. 218 (1973) limited the use of the Johnson v. Zerbst, 304 U.S. 458 (1938) formulation for determining waiver, "an intentional relinquishment or abandonment of a known right or privilege," in determining whether there had been a deliberate bypass for the purposes of Fay v. Noia, 372 U.S. 391 (1963) to waiver of those rights that protect a fair trial (A.43-44). Although the court addressed this argument, it rejected it on account of what it called the state's misfeasance in the preparation of respondent's trial transcript (A.44-45).

And, the court concluded that the seven month delay in the preparation of his trial transcript was sufficient cause to excuse the procedural default occationed by respondent's dismissal of his appeal. The court reasoned that this

was an objective factor external to his ability to comply with the state's procedural rules citing to this court's decision in Murrary v. Carrier, 106 S.Ct. 2639 (1986) (A.50,51).

The court's decision likewise declined to acknowledge that respondent's action was a tactical choice, one among others, designed to speed resolution of his claim while acting as his own counsel. The court had however, acknowledged that he was acting as his own counsel in dismissing the appeal in the body of its opinion (A.44).

REASONS FOR GRANTING THE WRIT

1) BOTH QUESTIONS INVOLVE QUESTIONS OF GREAT IMPORTANCE IN THE ADMINISTRATION OF HABEAS CORPUS PROCEEDINGS IN FEDERAL COURT.

2) BOTH QUESTIONS PRESENTED INVOLVE ISSUES WHICH HAVE GREAT IMPACT ON THE STRAINED RELATIONSHIPS BETWEEN STATE AND FEDERAL COURTS.

3) THE ELEVENTH CIRCUIT'S ANSWERS TO THE QUESTIONS PRESENTED ARE IN CONFLICT WITH DECISIONS OF THIS COURT.

The questions presented by the facts of this case address two doctrines of the utmost importance in bringing finality to adjudications of guilt in criminal cases. The decision below answers both questions in such a way as to undermine this value. Just this past term, a majority of this court reaffirmed the importance of this value in criminal litigation. The decisions include Murrary v. Carrier, 91 L.Ed.2d 397, 407-08 (1986)

and Smith v. Murrary, 91 L.Ed.2d 434, 447 (1986).

The decision below works an especially hard strain on the relationship between the state and federal courts. On dismissing his appeal in state court, respondent told it that he was doing so, as the magistrate so found without objection in his report and recommendation in district court case number 79-528, "in order that he may proceed with a post conviction proceedings in the trial court" after having sought and obtaining an extension of time in which to file the transcript (A.70). Now the lower federal courts enter the picture in subsequent proceedings and find in the district court that bad advice from a companion in prison and in the court below a seven month delay in the preparation of the transcript were the reasons for the dismissal and they constitute cause to excuse the procedural

default occationed by the dismissal of the appeal.

So finding, the courts below granted respondent relief which he could have had in state court if he had initially claimed and demonstrated that this delay amounted to a denial of due process. See Baggett v. Wainwright, 229 So.2d 239 (Fla. 1969) To subvert the state's procedural rules on so slim a showing is fundamentally unfair to the state courts and does the people of the State of Florida a grave injustice as well. Petitioners submit that if cause is serious enough to excuse a procedural default in state court it ought to be of a magnitude to support collateral relief in the state courts and be established there.

Even if the delay played a role in respondent's decision to attempt dismissal of his appeal in state court without prejudice, it cannot amount to cause in light of the decision in Murrary, supra.

The analysis below overlooks and fails to address the single most salient feature of the case. Respondent acted as his own counsel when he chose to dismiss his appeal in state court.

He, like other appellate litigators, was faced with the problem of delay in the preparation of trial transcripts. He had choices as to how he would cope with the problem. He could have been patient. He could have claimed to the state court that the delay amounted to a denial of an appeal, while his appeal was still pending in addition to the application for remedial writ filed the month before. He could have instituted a suit against the tardy court reporter. That tactic had been successful for him earlier in securing the discharge of Assistant Public Defender Terry Rogers.

But, he made a tactical decision. He dismissed his appeal to pursue his

collateral remedies. Perhaps he thought that the state speedy trial issue was so meritorious that he would win a discharge on that ground rather than simply a new trial. But, he guessed wrong. And that is the feature of the case that brings the decision below into conflict with Engle v. Isaac, 456 U.S. 107 (1982), Carrier and Smith. As the court said in Smith:

> Our cases, however, leave no doubt that a deliberate, tactical decision not to pursue a particular claim is the very antithesis of the kind of circumstance that would warrant excusing a defendant's failure to adher to a state's legitimate rules for the fair and orderly disposition of its criminal cases. Smith v. Murrary, 91 L.Ed.2d at 444 (1986).

The decision of the court of appeals in this case is just as inconsistent with Engle as was the decision of the court of appeals in Carrier ruling that ignorant or inadvertent attorney error could establish cause to excuse a procedural default.

The decision below is also

inconsistent with Murrary in that there is no showing that respondent is facutally innocent. Not only could he not demonstrate cause, he has not demonstrated prejudice.

The court's assessment of the deliberate bypass is just as much in conflict with the teaching of this court as is its analysis of the procedural default issue. Schneckloth v. Bustamonte, limited the use of the "intentional relinquishment or abandonment of a known right or privilege" language to trial rights for the purposes of determining whether there had been a deliberate bypass for the purposes of Fay v. Noia. Cf. Oregon v. Elstad, 84 L.Ed.2d 222, 237 (1985) (court has never embraced theory that ignorance of consequences undercuts voluntariness of decision). The court of appeals' use of a higher standard is clearly not justified by the facts of

this case. The exercise of a statutorily granted right to appeal is clearly not one of those fundamental personal trial rights necessary to guarantee an accused a fair trial.

The court of appeals' reassertion of the requirement of a habeas respondent's demonstrating that a petitioner gained a tactical advantage by giving up a right is directly contrary to this court's ruling in Murch v. Mottram, 409 U.S. 41, reh. denied, 409 U.S. 1119 (1972). If the demonstration of the gain of a tactical advantage were necessary to establish a deliberate bypass, the court would not have reached the result it did in that case.

The court of appeals had concluded in Mottram's case that he had not deliberately bypassed an available state remedy by withholding a claim by not joining it with the claim he did present

in state court.

This Court reversed. It found that the deliberate bypass test could not be premised on the individual's subjective intent. It reasoned that such a construction of deliberate bypass would render constitutionally valid procedural requirements utterly meaningless. Mottram gained no "tactical advantage" in deciding not to join all his claims in one proceeding in state court. Still, this Court found a deliberate bypass and denied him relief. The court of appeals' analysis of the deliberate bypass issue flies directly in the face of the result in Mottram's case.

The court of appeals' resolution of both the procedural default and deliberate bypass issues is directly contrary to many of this court's decisions on the questions presented. Because this case comes from a circuit in which there are several states

with a more than passing interest in finality as the people of these states believe in capital punishment and want to see it carried out, it works a special strain on the relationship between the state and federal courts.

CONCLUSION

This court needs to review the decision of court of appeals because it presents important questions in the administration of federal habeas corpus regarding finality of criminal litigation in an area of strained relationships between the state and federal courts. Petitioners respectfully ask that it do so.

Respectfully submitted,

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COUNSEL FOR PETITIONERS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to to James D. Whittemore, Esq., WHITTEMORE & CAMPBELL, P.A., 412 Madison Street, Suite 1207, Tampa, Florida 33602, this _____ day of _____, 1987.

_____
OF COUNSEL FOR PETITIONERS

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1986

No.

LOUIE L. WAINWRIGHT, etc., et al,

Petitioners,

v.

RICHARD T. DORMAN,

Respondent.

PETITION FOR CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-3512

RICHARD T. DORMAN,

Petitioner-Appellee,

versus

LOUIE L. WAINWRIGHT, etc., et al.,

Respondents-Appellants.

Appeal from the United States District Court for the Middle District of Florida

---

ON PETITION(S) FOR REHEARING

BEFORE: JOHNSON and ANDERSON, Circuit Judges, and GARZA*, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by appellant is DENIED.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

*Honorable Reynaldo G. Garza, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

REHG-4
(Rev.9/85)

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

LOUIE L. WAINWRIGHT,

Appellant,

V. CASE NO. 85-3512

RICHARD T. DORMAN,

Appellee.

PETITION FOR REHEARING

1. The court overlooks the decision in Murray v. Carrier, No. 84-1554 (U.S. June 26, 1986).

2. The court overlooks the fact that it has, without consideration or analysis, created a constitutional right for an accused to have a court consider his pro se offerings despite the fact that he is represented by counsel.

3. The court overlooks the fact that it has allowed petitioner to have it both ways. On the one hand, it has allowed him to be counsel by requiring the state court to give consideration to his pleadings while not holding him to the result to his own act as counsel, dismissal of the appeal.

4. The court overlooks that Murray

v. Carrier, supra., specifically rejects the broad reading the court gives to Fay v. Noia, 372 U.S. 391 (1963) in its decision in this case.

5. The court overlooks that its conclusion that the delay in the preparation constitutes cause was never called to the attention of the state courts and thus cause was found on the basis of an unexhausted issue in violation of Murray v. Carrier, supra.

6. The court overlooks that petitioner failed to established (sic) that he ever asked counsel to withdraw from representing him.

7. The court overlooks that petitioner's claim does not call into question the reliability of the determination of guilt and that he has, therefore, failed to show prejudice as a result of losing his defaulted claim. Murray v. Carrier, supra.

8. The court overlooks the fact that its decision invites and endorses the deliberate subversion of the state's attempt to conduct its courts in an orderly manner. All an accused has to do is submit written material to a state

trial court evidencing a desire to proceed pro se while represented by counsel, telling counsel nothing about it and then turn to this court for relief in the event of an unfavorable verdict in the state court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to James D. Whittemore, Esq., One Tampa City Center, Suite 2470, Tampa, Florida 33602 on this 26th day of September, 1986.

/s/
OF COUNSEL FOR APPELLANT

DORMAN V. WAINWRIGHT

Richard T. DORMAN,
Petitioner-Appellee,

v.

Louie L. WAINWRIGHT, Etc., et al.,
Respondents-Appellants.

No. 85-3512.

United States Court of Appeals,
Eleventh Circuit

Sept. 9, 1986

Defendant filed petition for habeas corpus relief, alleging that state court had erroneously denied his motions to proceed pro se. The United States District Court, Middle District of Florida, 79-1264-Civ-T-15, William J. Castagna, J., granted petition, and state appealed. The Court of Appeals, Garza, Senior Circuit Judge, sitting by designation, held that: (1) defendant clearly invoked desire to proceed pro se; (2) defendant did not waive right to self-representation, though he stopped filing letters and requests to proceed pro se after new counsel was appointed; and (3)

defendant did not "deliberately bypass" right to proceed pro se, though he dismissed direct appeal in which he asserted right.

Affirmed.

1. Criminal Law §641.4(1)

To properly invoke right to self-representation, defendant must do no more than state his request, either orally or in writing, in unambiguous fashion so that no reasonable person can say that request was not made.

2. Criminal Law §641.7(1)

After defendant invokes right to self-representation, district court must conduct hearing on waiver of right to counsel to determine whether defendant understands risk of proceeding pro se. U.S.C.A. Const. Amend. 6.

3. Criminal Law §641.4(1)

Defendant properly invoked right to self-representation, though district court never afforded him formal opportunity to show that he had requisite knowledge and intelligence to waive right to counsel. U.S.C.A. Const.Amend. 6.

4. Criminal Law §641.7(1)

District court has no duty to conduct hearing or to otherwise confront defendant about his desire to proceed pro se, though his conduct subsequent to invocation of right suggests that defendant is vacillating on decision.

5. Criminal Law §641.4(1)

Defendant did not waive right to self-representation, though from time substitute attorney was appointed to represent him defendant ceased filing request to proceed pro se, where there was evidence that defendant was on verge of being held in contempt for his repeated letters and motions to court requesting to proceed pro se.

6. Habeas Corpus §90.3(5)

Final judgment of state court on federal questions in state criminal proceeding is not res judicata in subsequent federal suit for habeas relief, and only considerations of comity and federal-state relations compel federal courts to decline relief, if appropriate.

7. Habeas Corpus §45.3(1.30)

In deciding whether defendant has "deliberately bypassed" his constitutional rights, so as to waive constitutional objections in subsequent habeas proceeding, district court should consider whether integrity of state's administration of justice is in any way compromised by allowing defendant to raise claims in federal forum, where the defendant has engaged in conduct that should disentitle him from receiving relief, and importance of constitutional right at issue in regard to fairness of trial.

8. Criminal Law §641.4(1)

Defendant did not "deliberately bypass" right to proceed pro se, though he dismissed direct appeal, in which he asserted right, where record reflected that defendant had to request several extensions of appellate timetable to keep appeal alive, and that only state's failure to timely provide the defendant with trial transcript prevented him from pursuing appeal.

9. Criminal Law §1166.11(6)

Erroneous denial of defendant's request to proceed pro se was inherently prejudicial, regardless of fairness of trial in which defendant was convicted.

Appeal from the United States District Court for the Middle District of Florida.

Before JOHNSON and ANDERSON, Circuit Judges, and GARZA*, Senior Circuit Judge.

GARZA, Senior Circuit Judge:

Nature of the Case

This habeas corpus appeal involves the denial of petitioner's constitutional right to self-representation as articulated in **Faretta v. California**, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Petitioner was charged and convicted of grand theft in the Circuit Court of the 13th Judicial District, Hillsborough County, Florida. After a long complicated procedural history pursuing state relief,

* Honorable Reynaldo G. Garza, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

petitioner exhausted his state remedies and applied to the federal district court for habeas corpus relief. The United States District Court for the Middle District of Florida found that petitioner's constitutional rights under **Faretta** had been denied and granted the Great Writ. The State of Florida now appeals from this judgment. Finding a grave violation of petitioner's constitutional rights, we affirm.

I. Facts and Procedural History

A. The State Court Proceeding

On or about January 17, 1978, the State Attorney of Hillsborough County, Florida filed an information charging Richard T. Dorman ("Dorman" or "petitioner") with grand theft in the second degree. From the outset of the prosecution, Dorman asserted his desire to proceed pro se, which was continually denied. The involved procedural history of Dorman's efforts to be his own lawyer is probably best summarized in the following chronology of events:

1/17/78	The State of Florida charges Dorman with grand theft in the second degree.

5/8 to 5/30/78	Dorman files a series of pro se pretrial motions in preparation for trial, all of which were either denied or ignored. Dorman's request to proceed pro se was expressly denied.[1]
6/6/78	Dorman sends a letter to the trial judge, Hon. Harry L. Coe III, requesting the dismissal of the public defender, Terry Rogers, and expressing his desire to proceed pro se.
7/5/78	Dorman sends another letter to Judge Coe requesting that he be allowed to proceed pro se.[2]
7/10/78	Dorman files a petition for a writ of mandamus in the state Court of Appeals requesting an order to Judge Coe to respond to and grant Dorman's pro se motions.[3] 1 Record, doc. 37, Exh. "L".
7/11/78	Judge Coe denies Dorman's requests and other pro se motions in the letters dated 6/6/78 and 7/5/78.

7/13/78	Dorman files in the trial court a motion to disqualify Judge Coe on grounds of prejudice against him because he will not respond to Dorman's pro se motions or allow him to proceed pro se. In this motion Dorman cites **Faretta v. California.**[4]
7/17/78	The Office of the Public Defender (Rogers) moves to withdraw as counsel for Dorman on grounds that Dorman would not cooperate with his attorney.[5] 2 Record at pp. 9-11.
7/24/78	Dorman appeals to the state Court of Appeals Judge Coe's denial of his requests (see 7/11/78). He cites **Faretta** and complains of Judge Coe's refusal to discharge the public defender.
Late July/ Early August	Dorman files a handwritten federal habeas corpus petition. It is rejected for failure to submit it on the standard forms. See 2 Record p.3; see also, 1 Record, doc. 7, exh. "M" and the "Reply to Respondent's

	Response to Show Cause Order" at p.5. Dorman cites Faretta in this petition and complains about the state's refusal to let him proceed pro se.
8/11/78	The state Court of Appeals denies Dorman's appeal of 7/24/78 without comment.[6]
8/14/78	Dorman's trial was originally scheduled for this date. It is postponed, apparently because of the public defender's withdrawal from the case and the trial court's search for new counsel to appoint.
Late August/ Early Sept.	Judge Coe appoints Wayne Timmerman to represent Dorman. Dorman learns that Rogers had withdrawn as counsel.[7] 2 Record at p.25; see also 1 Record, doc. 35, no. 13 at p. 13 and doc. 37, Exh. "D". During a hearing held around this time, Judge Coe gives Dorman the option of accepting newly appointed counsel or hiring his own counsel. Since he cannot afford to pay for private counsel

	Dorman acquiesces to the court's appointment of new counsel. Also, Dorman is prohibited from further speaking up in court. 2 Record at p.28.
10/24/78	Dorman goes to trial and is convicted of grand theft.
10/26/78	Dorman files a pro se notice of appeal to the state Court of Appeals. 1 Record, doc. 35, no.5.
11/3/78	Assistant Public Defender, Wayne Chalu, is appointed to handle Dorman's appeal.
11/14/78	Dorman sends a letter to the clerk of the trial court inquiring about the status of his trial transcript. 1 Record, doc. 37, Exh. "J".
11/28/78	Dorman files a pro se motion in the trial court to expedite the preparation of the trial transcript for purposes of appeal.[8]
12/8/78	The public defender (W. Chalu) files an amended notice of appeal. 1 Record, doc. 35, no.10.

12/12/78	Dorman discharges Chalu as his attorney. See 1 Record, doc. 7 at p.1 (Florida's "Response to Show Cause Order"); but cf. 2 Record at pp. 46-47 (Dorman thinks Chalu may not have been dismissed until May 1979, when the direct appeal was dismissed.) Despite his alleged discharge, Chalu continues to make requests for extensions of time for the filing of an appellate brief on grounds that the trial transcript has not been prepared and remains unavailable to the appellant. 1 Record, doc. 37, Exhs. "E"-"H".
12/14/78	Dorman files a writ of habeas corpus in the trial court alleging insufficiency of the evidence to support a judgment of conviction. The petition is never processed.
2/6/79	Dorman files a pro se supplemental appellate brief in the state Court of Appeals. 1 Record, doc. 35, nos.

	12,13. One of his points of appeal is the denial of his right to proceed pro se in the trial court. Id. no. 13 at p. 8.
4/16/79	Dorman files a "Petition for Remedial Writ" in the state Court of Appeals in an attempt to get the trial record transcribed. 2 Record at p.41.[9]
April or May 1979	Dorman is advised by a fellow inmate, who was previously a state court judge, to challenge his conviction on grounds of a state speedy trial violation using a Rule 3.850 motion. 2 Record at pp. 30-33.
5/25/79	Dorman files a motion to dismiss his direct appeal without prejudice so that he may attack his conviction using a Rule 3.850 motion instead.
6/11/79	The motion to dismiss the direct appeal without prejudice is granted. 1 Record, doc. 35, no. 15.

6/12/79	Dorman files a Rule 3.850 motion with the trial court along with a supporting brief. 1 Record, doc. 35, nos. 16,17.
7/13/79	Judge Coe summarily denies Dorman's Rule 3.850 motion with an annotation "should have appealed question". 1 Record, doc. 37, Exh. "K".
7/29/79	Dorman files a notice of appeal from the denial of the Rule 3.850 motion.
8/29/79	The Court of Appeals affirms per curiam the denial of the Rule 3.850 motion. 1 Record, doc. 7, Exh. "K4, 1 of 1"; see also 377 So.2d 176 (1979).
10/28/79	Dorman files a state habeas corpus petition (No. 79-1986) in the state Court of Appeals, raising the issue of his denial of his right to proceed pro se. Dorman also files about this time a federal habeas corpus petition (No. 79-528) complaining about the denial of the Rule 3.850 motion by Judge Coe, the

adverse disposition on appeal, and the denial of his right to reinstitute his direct appeal. 1 Record, doc. 7, para. IV; see also 2 Record at p.36.

12/3/79 Federal habeas petition number 79-528 is denied as being without merit. In this petition Dorman complained of the state's refusal to allow him to reinstitute his direct appeal. The district court, adopting the report of the magistrate, found that Dorman's due process right to appellate review of his conviction was not violated, the state having provided him an opportunity to present his claim. The court found further that "the lack of a transcript becomes harmless when viewed in the light of petitioner moving for and securing a dismissal of his appeal." Consequently, "his failure to secure effective review is

	attributable solely to his own action in dismissing his appeal." 1 Record, doc. 55, Exh. "A" and "B". See also infra note 16 for further explanation of this proceeding.
12/10/79	Dorman files another federal habeas corpus petition (No. 79-1264). 1 Record, doc. 1.
12/14/79	Dorman files his final federal habeas corpus petition (No. 79-1290). 1 Supp. Record, doc. 1.
1/22/80	United States Magistrate, Paul Game, Jr., for the United States District Court for the Middle District of Florida, enters an order consolidating Dorman's Section 2254 habeas petitions Nos. 79-1264 and 79-1290.

1. Dorman made the following pretrial motions: a motion to suppress evidence (5/28/78); a motion to suppress an unduly suggestive identification and a motion for discovery (5/30/78); a request for the removal of the public defender (6/26/78); a motion to compel (6/28/78); a motion to be present at the deposition of witnesses and a petition for a statement of particulars (7/2/78). See 1 Record, Doc. 37, Exh. "L".

2. Dorman testified at his federal evidentiary hearing that he had filed a civil suit against the Office of the Public Defender and his appointed attorney, Terry Rogers, to create a conflict of interest and thereby force Judge Coe to disqualify the public defender's office from representing him. 2 Record at p.16.

3. Dorman claims to have filed more than one writ of mandamus as well as petitions for rehearing when the writ of mandamus requests were denied. 2 Record at pp. 22-23.

4. Judge Coe denied the request. Dorman testified that contrary to Florida law, Judge Coe, rather than another state judge, ruled on Dorman's motion to disqualify. See 1 Record, doc. 35, no.13.

5. It appears that Dorman was not informed of the withdrawal of Rogers until new counsel, Timmerman, was appointed by the court. See 2 Record at p.25.

6. The Court of Appeals apparently denied the appeal on the ground that it was interlocutory.

7. Timmerman testified at the federal evidentiary hearing that Dorman was reluctant to accept newly appointed counsel. 2 Record at p.5.

8. Under Florida law Dorman had seventy days from his notice of appeal to file a brief in the court of appeals. See 1 Record, doc. 37, Exh. "I".

9. At the federal evidentiary hearing, a series of letters from the clerk of the state Court of Appeals pertaining to the remedial writ were introduced into evidence as "Composite Exhibit No. 2". 2 Record at pp. 41-43. We could not find these letters in the record.

10. The state alleged that grounds one and three through five could have been raised on direct appeal. It is not clear from the record why the state assumed that ground two, denial of a fair trial due to an unbiased judge, could not have been raised as an issue on appeal as well. See 1 Record, doc. 7, at p.3.

In petition Number 79-1264, Dorman alleged the following grounds for habeas corpus relief:

1) unconstitutional identification;

2) denial of fair trial due to the prejudice of the trial judge;

3) insufficient evidence to support a conviction.

In petition Number 79-1290, Dorman alleged two other grounds for relief;

4) denial of his right to a speedy trial; and

5) denial of his right to proceed pro se.

In its response to Magistrate Game's show cause order, the state contended that

four of the grounds for relief raised by Dorman in the federal forum could have been raised on direct appeal to the state Court of Appeals.[10] Consequently, Dorman's voluntary dismissal of his direct appeal constituted a deliberate bypass of state procedure as mentioned in **Fay v. Noia**, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963) and therefore, Dorman was precluded from raising these issues in federal court.

To the claim that Dorman was denied a fair trial due to the prejudice of the trial judge, the state argued that this complaint had not been presented in the state court pursuant to Rule 3.850 motion.[11] Therefore, Dorman had failed to exhaust his state remedies and this claim could not "be the subject of federal habeas review". 1 Record, doc. 7, para. VII.

10. The state alleged that grounds one and three through five could have been raised on direct appeal. It is not clear from the record why the state assumed two, denial of a fair trial due to an unbiased judge, could not have been raised as an issue on appeal as well. See 1 Record, doc. 7, at p.3.

11. The Rule 3.850 motion had presented only the claim of a state speedy trial act violation.

In response to the state's motion to dismiss on grounds of deliberate bypass and failure to exhaust state remedies, Dorman contended that the deliberate bypass rule of **Fay v. Noia** was inapplicable to these facts because the dismissal of his direct appeal was not done "knowingly and understandingly in order to secure some benefit to the Petitioner". 1 Record, doc. 25. Dorman also claimed that it was the state's undue delay in the preparation of the trial transcript that caused him to dismiss the appeal, which resulted in a vain attempt to obtain speedier review of his conviction. He summarized the countless attempts he had made to represent every available ground for relief to the state courts, both at the trial and at the appellate level, and to give the state the opportunity to "apply controlling legal principles to the facts bearing upon his constitutional claim". 1 Record, doc 25 at p.3. Dorman contends that his efforts more than satisfied any exhaustion defense that the state might raise. Id.

Magistrate Game scheduled an evidentiary hearing to pass on the issues of deliberate bypass and failure to

exhaust state remedies. In his report Magistrate Game recommended that Dorman'spetition be denied. Specifically, the magistrate found that 1) there was no basis in fact to the claim of an unconstitutional identification of Dorman by the victim because the trial transcript disclosed that the victim was well known by Dorman prior to the crime, 2) the alleged prejudice of Judge Coe against Dorman "relates solely to his dissatisfaction with the judge's (sic) decisions", 3) even if Dorman's factual allegations were true, they were "insufficient to form a basis for disqualification of the judge (sic) nor do the facts asserted establish a basis for habeas corpus relief in this Court", 4) there was sufficient evidence supporting the conviction to pass constitutional muster under Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), 5) Dorman's denial of his right to a speedy trial under state law did not present facts that would establish denial of his right to a speedy trial under the Constitution; and 6) the alleged denial of Dorman's right to represent himself at trial "is not borne out of the record."

On this last finding the magistrate held that "[a]t no time, at the trial court level, did he [Dorman] waive his right to appointed counsel" and that even though in a letter to Judge Coe he asked to be relieved of appointed counsel Dorman "did not express a desire to represent himself." Magistrate Game concluded that "[p]etitioner has failed to satisfy his burden of proof that he was forced to accept representation of counsel or that he voluntarily and intelligently elected to defend himself without counsel." The magistrate did not reach nor discuss the issue of deliberate bypass, an argument raised by the state in regard to Dorman's voluntary dismissal of his direct appeal. Needless to say, Dorman timely objected to all of the magistrate's findings and conclusions.

The United States District Court, Judge William J. Castagna, rejected the magistrate's report and recommendation in its entirety.[12] Because the magistrate

12. As a threshold matter, the court noted that Dorman had served his sentence and had been released from confinement during the pendency of these proceedings, raising a question of mootness. The court determined that because Dorman would continue to suffer collateral consequences

did not explicitly discuss the issue of deliberate bypass, the district court presumed that this issue had been resolved in Dorman's favor. Ruling that the state had not demonstrated that Dorman's dismissal of his direct appeal was an "intentional relinquishment or abandonment of a known right or privilege [citing Fay v. Noia]", the court reasoned that the appeal was dismissed because of the incorrect advice of a jailhouse lawyer and that Dorman had gained no tactical advantage from the dismissal of his direct appeal. In short, the state had not demonstrated that Dorman had made a "knowing and informed decision to bypass review under state procedures".

On the merits of Dorman's claims, the court found no basis for relief on the first four contentions but noted that the magistrate's factual findings and legal conclusions regarding Dorman's constitutional rights under Faretta were not "realistic". The court rejected the

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from his felony conviction, under the standards of Carafas v. LaValle, 391 U.S. 234, 239, 88 S.Ct. 1556, 1560, 20 L.Ed.2d 554 (1968), mootness did not preclude this action from proceeding. 1 Record, doc 52 (Order of May 1, 1985).

conclusion of the magistrate that Dorman had never explicitly stated that "he wanted to represent himself." The only factor that the district court could find in support of the magistrate's recommendation was Dorman's failure to discharge his second appointed counsel (Timmerman), a private attorney, a fact which could be interpreted as a desire by Dorman to represent himself only if the remaining option was the public defender's office. The district court found that "[s]uch conjecture is not justified on this record" and that "[t]he fact that Tinneman (sic) was not ever discharged and was not a public defender does not negate the fact that the state court trial judge continually denied Petitioner's clear desire to represent himself." The court concluded that Dorman "clearly invoked his right of self-representation sufficient to comply with the teachings of **Faretta v. California** and that the trial court denied him that significant constitutional right."[13]

13. The court granted the writ of habeas corpus, giving Dorman thirty days to request a new trial and ordering the state

In response to the district court's order, the state filed a "Motion For New Trial or to Alter or Amend Judgment", which raised the "cause and prejudice" doctrine for the first time in these proceedings.[14] The district court entered a second Order (of June 20, 1985) granting a stay of its first Order pending appeal of the case to the Eleventh Circuit Court of Appeals. The court adhered to its original judgment, however, and entered a supplemental findings and conclusions in support of its decision to grant Dorman relief.

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to comply within 120 days from the making of such request, provided, however, that Dorman's failure to request a new trial within the time stated would constitute an abandonment of the relief granted and the cause would become moot.

14. Citing **Wainwright v. Sykes**, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); **Francis v. Henderson**, 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976); **Davis v. United States**, 411 U.S. 233, 93 S.Ct. 1577, 36 L.Ed.2d 216 (1973).

In its second Order, the district court addressed several contentions raised by the state in its motion for new trial; 1) that the court had improperly considered Dorman's subjective intent in regard to the dismissal of his direct appeal, 2) that under **Wainwright v. Sykes**, Dorman did not satisfy the requirement of cause and prejudice sufficient to obtain review of his claim by a federal district court, 3) that the disposition of Dorman's federal habeas petition No. 79-528 resolved the issue of Dorman's dismissal of the direct appeal in favor of the state, and 4) that Dorman allegedly waived his right of self-representation when he failed to object to the appointment of private counsel (Timmerman) as his trial counsel.

First, the district court noted that it had relied on **Buckelew v. United States**, 575 F.2d 515, 519 (5th Cir. 1978) in making its finding on the deliberate bypass issue and that **Buckelew** was still good law. Second, in regard to the issue of procedural default under **Wainwright v. Sykes**, the court concluded that Dorman's case fell within the purview of the cause

and prejudice standard "as interpreted by the Eleventh Circuit subsequent to Sykes." [15] In regard to Dorman's federal habeas petition No. 79-528 the court reasoned that the issue presented there involved a different aspect of Dorman's dismissal of his direct appeal and the decision in that proceeding was not controlling on the question of deliberate bypass or procedural default.[16] Finally, the court rejected

15. Citing Ford v. Strickland, 696 F.2d 804 (11th Cir.), cert. denied, 464 U.S. 865, 104 S.Ct. 2301, 78 L.Ed.2d 176 (1983) and Huffman v. Wainwright, 651 F.2d 347 (5th Cir.), reh. en banc denied, 657 F.2d 1251 (1981).

16. In habeas petition No. 79-528, the only issue Dorman raised was the denial by the state of his right to a direct appeal. As mentioned above, Dorman had dismissed his direct appeal in an attempt to expedite review of his conviction via an alternative proceeding (a Rule 3.850 motion). Dorman was apparently under the impression that since the direct appeal was dismissed without prejudice, he would be able to reinstate it if his Rule 3.850 motion was denied. When the trial court denied relief on the Rule 3.850 motion, Dorman appealed to the state court of appeals. He also filed habeas action No. 79-528.

The magistrate's report and recommendation in that cause, which the district court adopted in its entirety,

the state's allegation that Dorman had waived his **Faretta** right by failing to continue to object to the appointment of Timmerman. Citing **Brown v. Wainwright**, 665 F.2d 607 (5th Cir., Unit B 1982) (en banc), the court noted that while it was possible for a petitioner to waive his **Faretta** right, neither was it necessary for Dorman to continually renew his request to proceed pro se after it had been conclusively denied.

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reviewed the constitutional obligations of a state to make direct appellate review available to petitioners, including the provision of a trial transcript or some reasonable alternative, if necessary, to assure meaningful appellate review. The magistrate concluded that even though Dorman, as an indigent, had a right to a free transcript, "the lack of a transcript becomes harmless when viewed in the light of petitioner [Dorman] moving for and securing a dismissal of his appeal." See 1 Record, doc, 55, Exh. "B" at p.2. The magistrate reasoned that Dorman had failed to prosecute his appeal because he wanted instead to proceed with a Rule 3.850 motion in the trial court and not because "he was unable to prosecute the appeal due to lack of his trial transcript". Id. Consequently, Dorman's failure to secure an appeal was "attributable solely to his own action in dismissing his appeal." Id. The state does not challenge the district court's disposition of this argument and the question is not before us on appeal.

The state filed a notice of appeal from the district court's judgment and the case was sent up for appellate review. Finding that the state denied Dorman his constitutional right to proceed pro se, that he did not waive this right, that the district court had the power to address the deprivation of this right, and that this claim is not barred by any considerations of federalism, comity, or the negligence or misbehavior of the petitioner, we affirm the judgment of the district court.

DISCUSSION

In **Faretta v. California**, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), the United States Supreme Court held that a criminal defendant in this country has a constitutional right to be his own lawyer; a Sixth Amendment right which, while difficult to discern from the text of the Constitution, is probably in harmony with the cultural character of the American people. **See McKaskle v. Wiggins**, 465 U.S. 168, 176-77, 104 S.Ct. 944, 950- 51, 79 L.Ed.2d 122 (1984) ("[t]he right to appeal pro se exists to affirm the dignity

and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's best possible defense"). But unlike other constitutional rights, the right to be one's own counsel can easily be overlooked or waived if a defendant does not properly invoke the right or inadvertently waives it through some procedural misstep. Consequently, even though there is no question that the right to proceed pro se exists, difficult issues arise in determining the scope of that right vis-a-vis the legitimate interests of both the state and federal judicial systems in the administration of justice. See Faretta, 422 U.S. at 852, 95 S.Ct. at 2549 (Blackman, J., dissenting).

This appeal presents several issues regarding the petitioner's invocation and retention of his Faretta right as well as issues regarding the power of the federal courts to reach alleged violations of constitutional rights that were inadequately or erroneously disposed of in the state court. Specifically, we must determine, first, whether the district court erred in finding that Dorman properly invoked his

right to proceed pro se and, second, that he did not waive this right by acquiescing to the appointment of private counsel (Timmerman). Third, we must decide whether the court erred in finding that Dorman did not deliberately bypass an opportunity for review of an alleged constitutional deprivation or, fourth, commit some other procedural default that should have precluded the federal district court from reaching the alleged constitutional claim.

Invocation of the Right to Proceed Pro Se

The state contends that the district court erred in finding that Dorman adequately invoked his right to self-representation. It argues that there is no finding that Dorman made a "knowing and intelligent" waiver of his right to counsel or that he was made aware of the dangers and disadvantages of self-representation. **See Faretta**, 422 U.S. at 835, 95 S.Ct. at 2541.

This is a specious argument. Under the facts here, the trial court never bothered to inquire whether Dorman was making a knowing and intelligent waiver of

his right to counsel or was aware of the dangers and disadvantages of self-representation. The constant summary denial of his requests prevent us from even reaching this step of the analysis. In **Faretta**, the Court noted that the petitioner and "clearly and unequivocably declared to the trial judge" his desire to proceed pro se. **Faretta**, 422 U.S. at 835, 95 S.Ct. at 2541. In **Brown v. Wainwright**, the "old Fifth"[17] provided guidelines for determining when the mutually exclusive right to counsel and the right to self-representation were in operation. 665 F.2d at 610-12. **Brown** held that the right to counsel was preeminent over the right to self-representation in the sense that the former attached automatically and had to be affirmatively waived to be lost whereas the latter did not attach unless and until it was asserted. **Brown**, 665 F.2d at 610 (emphasis is original).[18]

17. **Bonner v. City of Prichard**, 661 F.2d 1206, 1207 (11th Cir. 1981).

18. We note, however, that **Brown** did not require a state trial court to conduct a waiver hearing of a petitioner's **Faretta** right after it had been asserted as is required when waiver of right to counsel is at issue. 665 F.2d at 612.

[1,2] The magistrate in this cause reasoned that Dorman never properly invoked his right to self-representation because he never explicitly waived his right to counsel and never expressed that he wanted to represent himself. The district court correctly rejected this reasoning. To invoke his Sixth Amendment right under **Faretta** a defendant does not need to recite some talismanic formula hoping to open the eyes and ears of the court to his request. Insofar as the desire to proceed pro se is concerned, petitioner must do no more than state his request, either orally or in writing, unambiguously to the court so that no reasonable person can say that the request was not made. In this Circuit, the court must then conduct a hearing on the waiver of the right to counsel to determine whether the accused understands the risks of proceeding pro se. **United States v. Channey**, 662 F.2d 1148, 1152 (5th Cir., Unit B 1981). This hearing never occurred and these findings were never made.

[3] No reasonable person could deny that Dorman wanted to conduct his own defense. Not only did he cite **Faretta** in

several written requests to the trial judge but he began civil proceedings against the Public Defender hoping to create a conflict of interest that would force the trial judge to discharge appointed counsel and allow Dorman to defend himself. See 2 Record at p.16. The district court did not err in finding that Dorman clearly invoked his desire to proceed pro se. And although he never had a formal opportunity to show that he had the requisite knowledge and intelligence to waive his right to counsel, the record more than adequately reflects Dorman's awareness of the significant constitutional right that he wanted to give up.

Waiver

The state argues next that even if Dorman properly invoked his right to represent himself he subsequently waived that right by acquiescing to the appointment of Timmerman. Dorman's wish, claims the state, was not to proceed pro se, but to avoid having his case handled by the Public Defender. Although he was financially unable to retain his own attorney,

Dorman was willing to accept representation by private counsel appointed by the court. Having done so, Dorman waived or abandoned his desire to proceed pro se.

[4] We acknowledge the viability of this argument. Under the law of this Circuit, it is much easier to waive one's right to self-representation than to waive other constitutional rights, such as the right to counsel. In **Brown**, we held that "[a] waiver may be found if it reasonably appears to the court that defendant has abandoned his initial request to represent himself." 665 F.2d at 611. Moreover, a court has no duty to conduct a hearing or otherwise confront the defendant about his desire to proceed pro se even if by conduct subsequent to the invocation of his right the defendant appears to be vacillating on his decision. Id. at 612.

[5] The record contained two or three hints of Dorman's dissatisfaction with attorneys from the public defender

office.[19] Other than these faint inferences detectible in the record, however, Dorman's wish to proceed pro se rings out loud and clear. it is true, as the state points out, that from the time Timmerman was appointed until after the trial, Dorman stopped filing letters and requests to proceed pro se. But there is evidence that Dorman was on the verge of being in contempt of court by his repeated letters and motions to the court[20] and

19. After bombarding the state court judge with letters requesting that the public defender (Rogers) be withdrawn, Judge Coe appointed Wayne S. Timmerman as counsel for defendant. In the "Order Appointing Counsel", signed by Judge Coe III, the caption reads "THIS COURT has granted the Motion for Appointment of Private Counsel. . ." 1 Record, doc. 37, Exh. "D" (emphasis added). Moreover Dorman discharged the public defenders appointed to represent him in both state and federal court. He allegedly discharged the public defender (Chalu) appointed to handle the direct appeal of his conviction as well as the federal public defender appointed to handle his habeas corpus causes. The magistrate eventually appointed private counsel for Dorman to handle the lower court proceedings as well as this appeal. See 1 Record, docs. 19-24.

20. See supra text accompanying note 7.

it would be a weak right indeed if a defendant had to risk sanctions by the court to keep a constitutional right. Again, in Brown we stated that "[a]fter a clear denial of the request, a defendant need not make fruitless motions or forego cooperation with defense counsel in order to preserve the issue on appeal." 665 F.2d at 612.

The district court, contrary to the report of its magistrate, reviewed the evidence in support of a finding of waiver and rejected it. We can not say that the court was either factually or legally incorrect on this point and leave its ruling undisturbed.

Procedural Default: Based on Concepts of Waiver and Abstention

The last two issues in this appeal involve two doctrines that limit the discretion of a federal court in reviewing alleged constitutional deprivations in state criminal proceedings. One, the noton of "deliberate bypass", is identified with **Fay v. Noia**, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963). The other, the "cause and prejudice" exception, is identified with **Wainwright v. Sykes**, 433 U.S. 72, 97 S.Ct. 2497, 53

L.Ed.2d 594 (1977). It would be incorrect to say that these doctrines were created by **Fay** and **Sykes**, respectively, because their roots can be traced through a previous line of jurisprudence. See **Sykes, supra; Fay, supra.**

[6] In spite of these limiting doctrines there is no question that a federal court has the power to grant a state habeas petitioner relief if alleged constitutional deprivations are made out. Fay, 372 U.S. at 425-27, 83 S.Ct. at 841-43. Habeas corpus relief being founded in equity, the final judgment of a state court on federal claims is not res judicata and only considerations of comity and federal-state relations compel us to decline relief, if appropriate. Sykes, 433 U.S. at 80, 97 S.Ct. at 2502.

The state argues, first, that the district court should have dismissed Dorman's habeas corpus petition because he "deliberately bypassed" a state procedure for relief, that is, direct appellate review, when he dismissed his appeal in May 1979. Second, the state contends that

the court erred in finding that "cause and prejudice" existed to allow relief despite Dorman's procedural default of dismissing his direct appeal.

Deliberate Bypass

The so called deliberate bypass rule is a type waiver doctrine that precludes federal review of even meritorious constitutional claims. **Fay**, 372 U.S. at 439, 83 S.Ct. at 849; **Montgomery v. Hopper**, 488 F.2d 877, 879 (5th Cir. 1973). Because of the harshness of this result, **Fay** held that in asserting that a petitioner had deliberately bypassed a state remedy the state had the burden of showing that a petitioner's procedural default was an "intentional relinquishment or abandonment of a known right or privilege" 372 U.S. at 439, 83 S.Ct. at 849 (citing **Johnson v. Zerbst**, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938). In this Circuit we have construed the deliberate bypass rule in favor of habeas corpus petitioners, requiring in most cases an evidentiary hearing to show the intentional relinquishment of a right and the benefit of a tactical advantage by such relinquishment. **Buckelew v. United States**, 575 F.2d 515, 519 (5th Cir. 1978).

The state contends that "the indiscriminate use of the Johnson v. Zerbst formulation to determine deliberate bypass has not survived the test of time and that the Supreme Court in Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) "teaches that this test is only to be apply (sic) to those rights that protect a fair trial." We disagree with the state's application of Schneckloth. That case involved the waiver of petitioner's Fourth Amendment rights by consenting to the search of his car. The issue presented was whether the petitioner's ignorance of his Fourth Amendment rights invalidated the "voluntariness" of his consent. The Court held that the voluntariness of a consent search was a question of fact to be determined from the totality of all the circumstances and that knowledge of the right to refuse consent constituted only one factor to be considered in making such an assessment. Schneckloth, 412 U.S. at 227, 93 S.Ct. at 2047.

Schneckloth also addressed the argument that a consent is a "waiver" of a person's constitutional rights and that under the doctrine of Johnson v. Zerbst,

the state had to demonstrate the petitioner's intentional relinquishment of a known right or privilege. 412 U.S. at 235, 93 S.Ct. at 2051. But the Court refused to incorporate the Johnson formulation of waiver into the area of Fourth Amendment searches and seizures reasoning that it was meant to safeguard only those constitutional guarantees necessary to preserve a fair trial. 412 U.S. at 236-37, 93 S.Ct. at 2052-53.

Relying on this language, the state argues that only an appeal is at issue here, not Dorman's right to a fair trial. Therefore, the "knowing and intelligent relinquishment of a known right or privilege" test of Johnson, is not applicable here. The state contends that since no fundamental constitutional right (to a fair trial) is at issue here and since, acting as his own counsel, Dorman deliberately dismissed his direct appeal, he should be held responsible for the consequences of his actions.

Were it not for the state's own misfeasance in the preparation of Dorman's trial transcript we would find this argument more compelling. The state

essentially urges us to exercise a wooden application of the deliberate bypass rule. But this case does not lend itself to the tidy application of judicial catch phrases. To do justice, we must look beyond the literal meaning of the phrases which lawyers and judges alike use to encapsulate complex concepts.

[7] In regard to the deliberate bypass doctrine, the issue is not whether Dorman's decision to dismiss his direct appeal was deliberate (of course it was), it is whether Dorman was trying to either sandbag the court or engage in other conduct that should disentitle him from receing the relief that he seeks. See Fay, 372 U.S. at 438, 83 S.Ct. at 848. Another factor we must consider is whether the integrity of the state's administration of justice is in any way compromised by allowing Dorman to raise his claims in a federal forum. See id. at 433-39, 83 S.Ct. at 845-49. Finally, we must consider the importance of the constitutional right at issue in regard to the fairness of the trial. See Schneckloth, 412 U.S. at 236-37, 93 S.Ct. at 2052-53.

[8] Analyzed in this manner we cannot say that Dorman's dismissal of his direct appeal constitutes the type of conduct that should disentitle him from relief. The record reflects that he had to request several extensions of the appellate timetable to keep the appeal alive and that only the state's failure to timely provide Dorman with a trial transcript prevented him from following up the appeal. He cannot be faulted for seeking alternative relief after such an unreasonable delay in the preparation of his trial transcript.

The record also reveals that the state's interest in the administration of its criminal justice system free of undue federal interference has not been compromised. Dorman presented the state with ample opportunities to address his constitutional claims, especially that of the right to self-representation. Having failed to even address the question, the state cannot now complain about the federal court's exercise of its power over the state in vindicating constitutional guarantees. Finally, although we may question whether the right to proceed pro

se is fundamental to the fairness of a trial, our refusal to recognize it under the facts presented in this case would completely repudiate the viability of the right. Moreover, it would reward the state for its sluggishness in providing indigent petitioners the means for state appellate review of alleged constitutional infirmities in their convictions.

The "Cause & Prejudice" Doctrine

[9] The state argues that the district court erred in finding that there was "cause and prejudice" as articulated in **Wainwright v. Sykes**, sufficient to excuse Dorman from the procedural default he committed (dismissing his direct appeal) and that the district court wrongfully used this doctrine as a means of circumventing the deliberate bypass standard of **Fay v. Noia**. We disagree. Although he committed a procedural default when he dismissed his direct appeal, the district court correctly found that Dorman met his burden of showing cause and prejudice for the default. Consequently, the court did not err in reaching the merits of the alleged constitutional violation or in finding in favor of Dorman on the allegation.

On its face, **Wainwright v. Sykes** appears to rest on the well-known but elusive doctrine of independent and adequate state grounds.[21] At first blush, the underlying premise of **Sykes** seems to be that a habeas petitioner should not be able to raise in a collateral proceeding (i.e., habeas corpus) federal issues that could not have been raised on direct review under the doctrine of independent and adequate state grounds. A more thorough analysis, however, reveals that this doctrine rests on jurisdictional concepts pertinent to direct appellate review that are inapposite with the unquestioned power of federal courts in the area of habeas corpus. **See Fay v. Noia**, 372 U.S. at 428-30, 83 S.Ct. at 843-44 ("[t]he jurisdictional prerequisite [for federal habeas corpus] is not the judgment of a state court but detention simpliciter").

21. For a thorough, albeit dated, discussion of this doctrine, see the annotation at 24 L.Ed.2d at 837 (1970).

The independent and adequate state grounds rule "is a consequence of the Court's obligation to refrain from rendering advisory opinions or passing upon moot questions." Id. at 429-30, 83 S.Ct. at 844; see also 2 Fed.Pro. §§ 3:93-3:94 (Law.Ed.1981). Contrariwise, the Supreme Court has consistently reiterated that in habeas corpus proceedings federal courts possess the power to reach the merits of federal claims. See generally Murray v. Carrier, ___ U.S. ___, 106 S.Ct. 2639, 91 L.Ed.2d ____ (1986); Wainwright v. Sykes, supra; Fay v. Noia, supra.

Principles of comity and federalism then, rather than notions of power and jurisdiction, govern a federal court's discretion in refusing to hear petitions otherwise cognizable in federal court. As such, the type of procedural default in Wainwright v. Sykes involves a type of abstention. See Murray v. Carrier, ___ U.S. at _____, 106 S.Ct. at 2678-79 (Brennan, J., dissenting).[22]

22. Put another way, the cause and prejudice doctrine focuses on procedural missteps by a petitioner (or his counsel) that, pursuant to principles of comity and federalism, should compel the district court to refrain from the exercise of its

In the recent decision of Murray v. Carrier, supra the Supreme Court gave us further guidance on the doctrine of procedural default under Sykes and the proper application of the cause and prejudice standard. Carrier held that the cause and prejudice doctrine applies to all procedural defaults regardless of what stage of the proceeding, trial or appellate, the default at issue occurs. Carrier, ____U.S. at ____, 106 S.Ct. at 2646-47. We have already acknowledged that a procedural default occurred here.

Carrier further provides that "the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective

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jurisdiction, absent an exculpatory reason for the misstep and a showing of prejudice flowing from the error, whether committed intentionally, inadvertently, or negligently. On the other hand, the deliberate bypass doctrine focuses on conduct of a petitioner (or his counsel) that lends itself to a waiver analysis. See Fay v. Noia, 372 U.S. at 438, 83 S.Ct. at 848. This distinction may provide a starting point for placing these two doctrines in perspective, even though their application to specific facts more often than not results in imperfect fits.

factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." ___ U.S. at ___, 106 S.Ct. at 2646. That requirement has certainly been met here. The state unabashedly argues that Dorman should not have dismissed his direct appeal and that he should now live with the consequences of his actions. We cannot agree. The state's failure to provide Dorman with a trial transcript within a reasonable time to perfect his appeal constitutes an external factor out of Dorman's control that suffices as "cause" for the dismissal of the direct appeal.

Finally, given the nature of the constitutional right at issue, we are compelled to find inherent prejudice in the denial of the right. The Supreme Court has held that the denial of the right to proceed pro se is not amenable to harmless error analysis. McKaskle v. Wiggins, 465 U.S. 168, 177 n.8, 104 S.Ct. 944, 951 n.8, 79 L.,Ed.2d 122 (1984) ("The right [to proceed pro se] is either respected or denied; its deprivation cannot be harmless"). If the deprivation of this right cannot be harmless it must,

by definition, be prejudicial. In this case Dorman's constitutional right to proceed pro se was unquestionably denied. Therefore, regardless of the fairness of the trial at which he was convicted, he was prejudiced. The district court did not err in so finding and, accordingly, we AFFIRM.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

RICHARD T. DORMAN,

Petitioner,

vs. Case No. 79-1264-Civ-T-15
and 79-1290-Civ-T-15

LOUIE L. WAINWRIGHT,
Secretary, Department of
Corrections, State of Florida,

Respondent.

ORDER

The Court has for consideration the respondent's Motion for New Trial Or To Alter or Amend Judgment. The petitioner has timely responded. Respondent raises three grounds for attacking this Court's prior decision.

First, the state contends that the Court erred in concluding that the petitioner had not deliberately by-passed his direct appeal. The purported error is that the "subjective intent" in dismissing petitioner's direct appeal and any tactical advantages stemming therefrom were improper considerations in the Court's determination. In making its by-pass

finding, however, the Court followed Buckelew v. United States, 575 F.2d 515, 519 (5th Cir. 1978), which remains good law to date. In short, the respondent's argument as to this point merely reflects dissatisfaction with the holding in Buckelew. This Court, bound as it is by that decision, must leave any reexamination of the viability of that authority to the court of next resort.

The respondent's second contention deals with the issue of procedural default, which was not examined in the previous order of this Court. As the respondent's authority recognizes:

> Thus, in this Circuit a state prisoner can forego the opportunity to raise constitutional issues in habeas corpus proceedings by deliberately bypassing state appellate procedural rules or by merely failing to follow them without showing cause for the default and prejudice resulting from it.

Ford v. Strickland, 696 F.2d 804, 817 (11th Cir.) (en banc), cert. denied, 104 S.Ct. 201 (1983). The "cause" and "prejudice" standard for determining procedural default, as set forth in Wainwright v. Sykes, 433 U.S. 72 (1977), admittedly nar-

rows the "deliberate by pass" formulation of Fay v. Noia, to prohibit "sandbagging" of claims during state court litigation. Nevertheless, this Court is convinced that the instant case falls within the purview of "cause and prejudice" as interpreted by the Eleventh Circuit subsequent to Sykes. Of particular significance are Huffman v. Wainwright, 651 F.2d 347 (5th Cir.), reh. en banc denied, 657 F.2d 1251 (1981) and Ford v. Strickland, 696 F.2d 804, 816-17 (11th Cir. 1983). In Huffman, the Court emphasized that the Sykes rule regarding procedural default, as well as Justice Stevens' concurrence in that case, seek to avoid a miscarriage of justice, and "if the constitutional issue is sufficiently grave, even an express waiver by the defendant himself may sometimes be excused." Huffman, 651 F.2d at 351 (quoting Justice Stevens' Sykes concurrence, 433 U.S. at 95-96). Here, the petitioner has demonstrated cause, incorrect legal advice from his jailhouse consultant, and prejudice, in that the clear constitutional right of self-representation and whatever benefits flowing therefrom were deprived in this instance.

One final point is relevant to the

procedural default inquiry. As to petitioner's case number 79-528 Civ-T-WC, it is true that the Magistrate found that his "failure to secure effective review [was] attributable solely to his own action in dismissing his appeal." Report and Recommendation dated November 26, 1979, at 3. The issue in that petition, however, was whether the state denied him his right to appeal. There is no doubt that the petitioner voluntarily dismissed his state court appeal. That finding, of course, was entirely relevant to the merits of the denial of appellate review claim and necessarily mandated a finding that the state had not denied the petitioner his right to appeal. But the inquiry in the instant case is vastly different. Here, the question is whether the petitioner's claim should be barred as a procedural matter, given the fact that his state appeal was voluntarily dismissed. In short, the result in the instant case is entirely consistent with the result in case number 79-528 Civ-T-WC. Furthermore, it should be noted that the Court in that case reached the merits of the claim as well.

Finally, in regards to the merits of

the petition, the respondent argues that this Court failed to recognize and apply Brown v. Wainwright, 665 F.2d 607 (5th Cir. 1982) (en banc), which is controlling authority in this Circuit. The reason therefor, of course, is that to the Court's knowledge Brown was never cited to this Court until after issuance of the Order on the Report and Recommendation in the respondent's Motion for New Trial. Be that as it may, Brown does not alter the Court's determination that the Petitioner sufficiently initially invoked his right to self-representation under Faretta v. California, 422 U.S. 806 (1975). Brown does raise an additional issue - waiver of the right to self-representation after the initial request - that was not considered earlier by the court.

The state contends that by his subsequent conduct, petitioner waived his Faretta claim. The contention is that petitioner's last documented request for self-representation occurred on July 19, 1978, while he was represented by public defender Terry Rogers, and that Wayne Timmerman was appointed as his new counsel on September 6, 1978. The state contends, therefore, that since no motions or

efforts to discharge Timmerman were undertaken, the Faretta claim was waived by lack of action.

First, the Court notes that the petitioner continued to seek self-representation and cited Faretta in his Motion for Rehearing directed to the Florida Appellate Court dated July 24, 1978, and in his federal habeas corpus petition dated July 29, 1978. Even more importantly, however, the petitioner's request for discharge of counsel and his efforts to proceed pro se were clearly and unequivocally denied by the state court trial judge on July 11, 1978. See Petitioner's Composite Exhibit 1, at 1. As the Brown court observed:

> Neither should it (the Court's decision) be read to indicate that a defendant, to avoid waiver, must continually renew his request to represent himself even after it is conclusively denied by the trial court. After a clear denial of the request, a defendant need not make fruitless motions or forego cooperation with defense counsel in order to preserve the issue on appeal.

612 F.2d at 612. Pursuant to this reasoning, lack of action occurring after the July 11 denial could not operate as a

waiver of the Faretta issue, even though, as noted above, this petitioner did attempt relief in other courts on this issue.

The state further contends that this Court, in its Order dated May 1, 1985, improperly discounted the Magistrate's credibility evaluation of Timmerman's testimony. This Court did not discount that testimony, however. A close reading of the Order reveals that this Court examined Timmerman's testimony and found that it was not inconsistent with the petitioner's expressed desire for self-representation. And under Brown, petitioner's dealings with Timmerman, having occurred after the July 11 denial, are not particularly relevant to the issue at hand.

In conclusion, the Court recognizes the apparent incongruity that prevades this case. On one hand, the petitioner complains of his inability to represent himself in state court. On the other hand, his own actions undoubtedly led to the problems encountered in relation to the deliberate bypass and procedural default issues. Nevertheless, this Court notes that Faretta clearly recognized a

constitutional right of self-representation. Implicit in that right is the notion that in at least some instances a defendant may actually conduct his substantive defense in a superior manner to his counsel, despite his lack of technical legal skills. See Faretta, 422 U.S. at 834-35. In light of the significant and personal nature of that right, this Court finds no real inconsistency in permitting the petitioner to vindicate his substantive constitutional right at trial despite the obstacles to review occasioned by his subsequent attempt at self-representation on appeal. Accordingly, it is

ORDERED:

1. The respondent's Motion for New Trial Or to Alter Or Amend Judgment is Denied.

2. Respondent's Motion for Stay Upon Appeal is Granted. The Court recognizes that the serious issues presented in this case are subject to debate. Although the Court does not find reversal likely, it nevertheless notes that the closeness of questions presented creates a sufficient potential for reversal such that the parties should not be put through the burden

and expense of a new trial without a definitive resolution of the case at the appellate level. The execution of the writ will be stayed pending further order of Court and conditioned upon Respondents prompt and diligent pursuit of an appeal.

DONE and ORDERED at Tampa, Florida this 19th day of June, 1985.

/s/
WILLIAM J. CASTAGNA
UNITED STATES DISTRICT JUDGE

Copies to
Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

RICHARD T. DORMAN,

Petitioner,

vs. Case No. 79-1264-Civ-T-15
and 79-1290-Civ-T-15

LOUIE L. WAINWRIGHT,
Secretary, Department of
Corrections, State of Florida,

Respondent.
_____/

MOTION FOR NEW TRIAL
OR TO ALTER OR AMEND JUDGMENT

COMES NOW the Respondent, Louie L. Wainwright, Secretary of the Department of Corrections of the State of Florida, by and through the undersigned Assistant Attorney General for the State of Florida and moves this Honorable Court to grant a new trial or alter or amend judgment in the above styled cause pursuant to the provisions of Federal Rule of Civil Procedure 59 and as grounds therefore shows this Honorable Court as follows:

1. The court erred as a matter of law in its conclusion that the petitioner had not deliberatly (sic) bypassed available state remedies in dismissing his direct appeal

by focusing on the petitioner's subjective intent in voluntarily dismissing his appeal and in giving consideration to whether the petitioner gained a tactical advantage.

2. The court erred as a matter of law in failing to give full effect to the procedural default worked by the petitioner's dismissal of his appeal which had previously been given full effect in this court's case number 79-528-Div-T-WC (sic). Copies of the magistrate's Report and Recommendation and the district court's order adopting it as its own are attached as exhibit "A" and "B" respectively and by reference made a part hereof for all purposes.

3. The Court erred as a matter of law on the merits of the Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) issue in failing to recognize and apply controlling case law from this circuit to the resolution of the issue.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

/s/
DAVIS G. ANDERSON, JR.
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to James D. Whittemore, Esq., WHITTEMORE & CAMPBELL, P.A., 412 Madison Street, Suite 1207, Tampa, Florida 33602, this 10th day of May, 1985.

/s/
OF COUNSEL FOR RESPONDENT

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

RICHARD T. DORMAN, #066874 *
*
Petitioner, *
*
CASE NO. 79-528 Civ-T-WC
*
-vs- *
*
LOUIE L. WAINWRIGHT, *
Secretary, Department of *
Offender Rehabilitation, *
State of Florida, *
*
Respondent. *

O R D E R

This cause came on for consideration upon the filing by a state prisoner, Richard Dorman, of a petition for writ of habeas corpus.

This matter was considered by the United States Magistrate, pursuant to general order of assignment, who has filed his report recommending that the petition be dismissed as being without merit.

Upon consideration of the report and recommendation of the Magistrate and upon this Court's independent examination of

EXHIBIT A

the file, the Magistrate's report and recommendation is adopted and confirmed and made a part hereof, and it is

ORDERED:

1. That the petition for writ of habeas corpus be dismissed with prejudice as to the claim that Petitioner was denied his right of appeal.

2. Each party shall bear its own costs.

DONE and ORDERED at Tampa, Florida this 3rd day of December, 1979.

W. Terrell Hodges /s/
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

RICHARD T. DORMAN, :

Petitioner :

vs. No. 79-528 Civ.T.-WC

LOUIE L. WAINWRIGHT, :
Secretary, Department of
Offender Rehabilitation, :
State of Florida,
:

Respondent
:

REPORT AND RECOMMENDATION

THIS CAUSE came on for consideration upon the filing by a state prisoner, Richard Dorman, of a petition for writ of habeas corpus. Petitioner is presently imprisoned after being convicted of grand theft. Petitioner seeks habeas relief on the ground that he was denied his right of appeal. An examination of the entire file discloses that the claim is without merit.

Although petitioner's appeal from the denial of his Rule 3.850 motion alleging speedy trial violations is currently pending before a Florida appellate court, petitioner, as to the issue raised sub

EXHIBIT B

judice, has exhausted his available state court remedies. A review of the file discloses that petitioner petitioned the Second District Court of Appeal of Florida for a writ of habeas corpus, alleging that he was denied his right of appeal. In Florida, the appropriate state remedy for challenging post-conviction errors is by petition for writ of habeas corpus directed to the appellate court and not by a motion pursuant to Rule 3.850 Fla. R.Cr. Pro., Mays v. State, 285 So.2d 239 (Fla. App. 1973); Baggett v. Wainwright, 229 So.2d 239 (Fla. 1969). Accordingly, I find that petitioner has exhausted his available state remedies as to the instant issue as required by Galtieri v. Wainwright, 582 F.2d 348 (5th Cir. 1978) and 28 USC §2254.

Petitioner alleges that he was denied his right of appeal because he was unable to obtain a transcript of his trial proceedings. An examination of the file reveals that petitioner filed pro se a notice of appeal. Thereafter, because he was indigent the public defender was appointed to prosecute the appeal. The public defender filed written directions and designation to the clerk requesting

the trial transcript. Petitioner's appellate counsel also secured an extension of time within which to file the transcript. Respondent, in his Response to the Order to Show Cause does not contend that the petitioner did in fact receive a trial transcript.

Although a state is not required by the Federal Constitution to provide appellate review of criminal conviction, McKane v. Kurston, 153 US 684, when a state does provide appellate review it has a duty "to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the state's appellate process." Ross v. Moffitt, 417 U.S. 600 (1974). That duty includes an obligation to provide trial transcripts to appellants who are unable to pay for them. Griffin v. Ill. 351 US 12 (1956). Moreover, at all stages of the appellate proceedings the Due Process and Equal Protection Clauses protect the appellant from invidious discriminations. Griffin v. Ill., ID. However, where the transcript is no longer available, through no fault of the state, there is no violation of equal protection. Norvell v. Illinois, 370 US 420 (1962). Furthermore, where an

adequate alternative to the transcript is made available, the rule of Griffin is not violated. Britt v. North Carolina, 404 US 226 (1971).

Although petitioner, as an indigent, had a right to a free transcript or some reasonable alternative, the lack of a transcript becomes harmless when viewed in the light of petitioner moving for and securing a dismissal of his appeal. See Ennis v. Lefevre, 560 F.2d 1072 (2nd Cir. 1977). Petitioner, after securing an extension of time within which to file the transcript of the trial proceedings, moved to dismiss his appeal on May 23, 1979. The petitioner in his motion to dismiss did not allege that he was unable to prosecute the appeal due to lack of his trial transcript, rather he alleged that he desired the dismissal "in order that he may proceed with a post-conviction proceeding in the trial court." The appellate court entered an order dismissing the appeal on June 11, 1979.

It is speculation whether the transcript would or would not have been provided by the state had petitioner not moved for a dismissal. Petitioner was not denied an "opportunity to present his

claim fairly in the context of the States appellate process," Ross v. Moffitt, supra, he chose not to present his claims at all in the appellate process. Petitioner was not denied his right to appellate review, rather his failure to secure effective review is attributable solely to his own action in dismissing his appeal. See McGriff v. Wainwright, 431 F.2d 897 (5th Cir. 1970).

Accordingly, for the foregoing reasons, I recommend that the instant petition be dismissed.

This 26th day of November, 1979, at Tampa, Florida.

/s/
PAUL GAME, JR.
UNITED STATES MAGISTRATE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

RICHARD T. DORMAN,

Petitioner,

vs. Case No. 79-1264-Civ-T-15
and 79-1290-Civ-T-15

LOUIE L. WAINWRIGHT,
Secretary, Department of
Corrections, State of Florida,

Respondent.

MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR NEW TRIAL
OR TO ALTER OR AMEND JUDGMENT

It is true that Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963) used the "intentional relinquishment or abandonment of a known right or privilege" language from Johnson v. Zerbst, 304 U.S.A. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) when it first defined "deliberate bypass." And, it is also true that some of the circuit courts looked to the (sic) whether there was a tactical advantage gained by the behavior characterized as deliberate bypass before so labeling it and accepting the consequences flowing from such a characterization. See e.g. Buckelew v. United States, 575 F.2d 515

(5th Cir. 1978).[1]

But, indiscriminate use of the Johnson v. Zerbst, formulation to determine deliberate bypass has not survived the test of time. And, consideration of any tactical advantage to be gained in determining deliberate bypass has gone by the board in light of later jurisprudence. In addition to those cases recognizing and applying procedural defaults unless they are excused by both cause and prejudice like Davis v. United States, 411 U.S. 233, 93 S.Ct. 1577, 36 L.Ed.2d 216 (1973); Francis v. Henderson, 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976) and Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); other decisions have limited the applicability of the Johnson v. Zerbst, formulation to determine deliberate bypass. For example, Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) rejected the application of the "intentional relinquishment

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[1] See **Bonner v. City of Prichard**, 661 F.2d 1206 (11th Cir. 1981) (en banc) (adopting as precedent for the circuit all the decisions of the former Fifth Circuit decided prior to October 1, 1981)

or abandonment of a known right or privilege" formulation in determining whether a consent to search would be upheld. In reaching that conclusion, the court teaches that this test is to be applied only to those rights that protect a fair trial. 412 U.S. at 236-247. Trial rights are not at issue here so the knowing and intentional relinquishment of a known right or privilege test to determine a deliberate bypass is not aposite (sic).

Likewise, if the gaining of a tactical advantage were necessary to demonstrate a deliberate bypass as Buckelew v. United States, supra indicates then Murch v. Mottram, 409 U.S. 41, 93 S.Ct. 71, 34 L.Ed.2d 194 reh. hen. 409 U.S. 1119, 93 S.Ct. 894, 34 L.Ed.2d 704 (1972) would not have reached the result that it did. In that case, the court of appeals had concluded that Mottram had not deliberatly (sic) bypassed an available state remedy by withholding the claim he later persuaded the court had merit by not joining it with the claim he did present to the state court when acting on the advice of counsel and contrary to the advice of the judge because the law of the state was unclear on whether failure to

join would result in a waiver. The Supreme Court reversed. It found that the deliberate bypass test could not be premised on the individual's subjective intent. It reasoned that such a construction of deliberate bypass would render constitutionally valid procedural requirements utterly meaningless. It said:

> In this sensitive and oft times strained area of federal-state relations, a state prisoner ma (sic) not deliberatly (sic) "elect" not to comply with the interpretation of the state procedural statute by the state court, and then assert in federal court that no rights were waived because he did not have the subjective intent to waive his constitutional claims. 409 U.S. at 46.

Mottram gained no "tactical advantage" in deciding not to join all his claims in one proceeding in state court. Still the Supreme court found a deliberate bypass and denied him relief. Accordingly, that portion of Buckelew v. United States, supra counseling a look to whether the prisoner gained a "tactical advantage" by his action or inaction is clearly erroneous in light of the teaching of Murch v. Mottram, supra.

This petitioner chose to dismiss his

appeal. He told the state court he wanted to do so because he wanted to proceed with an action in the trial court under the aegis of Florida Rule of Criminal Procedure 3.850. Contrary to what this petitioner told the state court, this Court found that he dismissed his appeal in state court because he was having difficulty obtaining the record. In any event, it is clear that this petitioner acted as his own counsel in determining to dismiss the appeal in state court. There is no contention that the dismissal of the appeal was not his own voluntary act. He had counsel on appeal, Wayne Chalu, but he chose not ask counsel what the consequences of his action would be. Since he chose to act as his own counsel, despite the availability of competent counsel on appeal, he cannot complain that he was wrong about the consequences of his actions. Faretta v. California, 422 U.S. 806, 834 n. 46, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); Hance v. Zant, 696 F.2d 940, 950 (11th Cir. 1982), cert. denied, 103 S.Ct. 3544 (1983). Analytically, this petitioner is indistinguishable from Mottram. The factual distinctions between the two cases do not import a real legal

difference.

The court should also consider Bradley v. Davis, 551 F.Supp. 479 (D.C.D. Maryland 1982) cpc denied and appeal dismissed, 705 F.2d 441 (4th Cir. 1982), cert. denied, 103 S.Ct. 3546 (1983) (failure to appeal from order denying post-conviction relief in state court treated as deliberate bypass where record showed petitioner had shown some familiarty (sic) with legal research and procedures) and Jackson v. Cupp, 693 F.2d 867 (9th Cir. 1982)(dismissal of state appeal to pursue federal habeas remedy where there had been delay in the preparation of the transcript characterized as deliberate bypass but case disposed of on exhaustion grounds) in its decision on the deliberate bypass issue. This petitioner has demonstrated some familiarty (sic) with relevant statutory and case authroity (sic) and should be bound by his own mistakes just as the petitioner in Bradley v. Davis, supra was.

PROCEDURAL DEFAULT

Both the district court's order and

the Magistrate's Report and Recommendation simply ignore the Respondent's contention that the court is barred from reaching the merits by the petitioner's procedural default. The Respondent urged this procedural default in his motion to dismiss filed in case number 79-1264-CIV-T-WC, the case containing the self-representation claim, on October 31, 1980 and argued it at page two of the memorandum of law in support of the motion. In this Court's decision in a previous case involving the same case in state court, this court's case number 79-528-CIV-T-WC, gave full effect to that procedural default when it declined to order the state court to afford the petitioner another appeal in the appeal he dismissed.

This court should consider and rule on the Respondent's procedural default argument. It is meritorious and disposes of the case in keeping with another Judge Hodges' earlier disposition of the matter in keeping with current precedent in this circuit. With Wainwright v. Sykes, 433 US. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), the Supreme Court made it clear that the inferior federal courts are to recognize and apply otherwise constitu-

tionally valid state rules working procedural defaults in the context of proceedings under 28 U.S.C. §2254 absent a showing by the habeas petitioner of both cause and prejudice to excuse the procedural default. Florida, like many other jurisdictions including the former Fifth Circuit,[2] enforces a rule that works a procedural default of any issue that could have been raised on direct appeal and was not raised. Ford v. Strickland, 696 F.2d 804, 816-817 (11th Cir. 1983) (Florida law works procedural default of issues which could have been but were not raised on appeal and federal courts are to recognize and apply default in absence of cause and prejudice or miscarriage of justice) Cf. King v. Strickland, 714 F.2d 1481, 1491 - 1492 (11th Cir. 1983)(failure to appeal from adverse decision on application for post-conviction relief) vacated on other grounds ___ U.S. ___ (1984) [35 Cr.L. 4061] opinion on remand ___ F.2d ___ (11th Cir.

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[2] See **Causey v. Civiletti**, 621 F.2d 691, 694 (5th Cir. 1980) reh. den. 633 F.2d 582 (5th Cir. 1980)(table)(2255 petitioner precluded from raising issues on collateral attack that he could have raised on direct appeal which he voluntarily dismissed)

1984) cert. denied, ___ U.S. ___ (1985) [37 Cr.L. 4015] These decisions are in keeping with the disposition in Causey v. Civiletti, 621 F.2d 691, 694 (5th Cir. 1980) reh. den. 633 F.2d 582 (5th Cir. 1980) (table) (2255 petitioner precluded from raising issues on collateral attack that he could have raised on direct apeal (sic) which he voluntarily dismissed) except they contain more analysis of the procedural default issue. This court should follow the Causey decision to promote the value of uniformity in the law.

THE MERITS OF THE **FARETTA** ISSUE

In disposing of right to self-representation issue on the merits, this court overlooked and failed to apply the controlling case law in this circuit on that issue, Brown v. Wainwright, 665 F.2d 607 (Former 5th Cir. 1982) (full bench en banc)[3] accord United States v. Weisz, 718

[3] See **Stein v. Reynolds Securities, Inc**, 667 F.2d 33, 34 (11th Cir. 1982) (adopting as precedent for the circuit all post September 30, 1981 decisions of the former Fifth Circuit and those decisions of Unit B of the former Fifth Circuit and full en banc decision of the Former Fifth

F.2d 413 (D.C. Cir. 1983). In that case, the court ruled that a waiver of the right to self-representation may be found if it reasonably appears that the defendant abandoned his initial request to represent himself, 665 F.2d at 611. The record in this case shows exactly that. In its decision on the merits of the self-representation issue, this court makes references to the petitioner's attempts to file pro se motions a pro se appeal and requests for law books and rules from the state trial judge. The last documented request for self-representation occurred on July 19, 1978 while the petitioner was still represented by Assistant Public Defender Terry Rogers. See Petitioner's Exhibit "A" The state trial court appointed Wayne Timmerman to represent the petitioner on September 6, 1978. Timmerman testified at the evidentiary hearing before the magistrate that while

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Circuit). **Brown** as been cited as controlling authority on the self representation issue in several Eleventh Circuit decisions. See e.g. **Goode v. Wainwright**, 704 F.2d 593, 598 - 599 (11th Cir. 1983) vacated on other grounds, ___ U.S. ___, 104 S.Ct. 378 (1983); **Raulerson v. Wainwright**, 732 F.2d 803, 808 - 809 (11th Cir. 1984).

the petitioner had thought about representing himself he never asked Timmerman to resign from the case and Timmerman did, in fact represent him in two trials, winning an acquittal in one and suffering a conviction in the other, the conviction that is presently under attack. Evidentiary Hearing Transcript 5 - 7.[4] When the petitioner testified, he spoke only in terms of trying to represent himself instead of accepting representation by Assistant Public Defender Terry Rogers. Evidentiary Hearing Transcript at 16. He only made one reference to informing Timmerman that he wanted to represent himself. Evidentiary Hearing Transcript at 26. He filed no further motions specifically seeking Timmerman's discharge and permission to proceed pro se. The petitioner acquiesed in Timmerman's handling

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[4] The magistrate apparently credited Timmerman's testimony in arriving at this conclusion that the petitioner had failed to satisfy his burden of proof. The district court cannot reject a magistrate's credibility choices without holding another evidentiary hearing. **Louis v. Blackburn**, 630 F.2d 1105, 1109 (5th Cir. 1980) See also **Proffitt v. Wainwright**, 685 F.2d 1227, 1237 -1245 (11th Cir. 1982) (discussing and applying rule)

of his trial. This is sufficient to support a finding of waiver of the right to self representation. And, it is substantially what happened in Brown v. Wainwright, supra. Assuming, arguendo, that it could reach the merits of this claim, this court should reach the same result on the merits of the self representation issue that the Brown court did.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

/s/
DAVIS G. ANDERSON, JR.
Assistant Attorney General
1313 Tampa Street, Suite 804
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(813) 272-2670

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to James D. Whittemore, Esq., WHITTEMORE & CAMPBELL, P.A., 412 Madison Street, Suite 1207, Tampa, Florida 33602, this 10th day of May, 1985.

/s/
OF COUNSEL FOR RESPONDENT

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

RICHARD T. DORMAN,

Petitioner,

vs. Case No. 79-1264-Civ-T-15
and 79-1290-Civ-T-15

LOUIE L. WAINWRIGHT,
Secretary, Department of
Corrections, State of Florida,

Defendant.

WRIT OF HABEAS CORPUS

The Court having considered the Petitioner's Petition for Writ of Habeas Corpus and the Defendant's Response thereto, and having entered an Order this day granting the writ, it is

ORDERED and ADJUDGED:

1. That upon written request from Petitioner filed in this cause within 30 days of the date hereof, the State of Florida is directed to provide to Petitioner a new trial within 120 days from the date of such request.

2. Failure of Petitioner to file such request within the time set forth shall constitute an abandonment of the

proffered relief and this cause shall, without more, become moot and stand dismissed.

DONE and ORDERED at Tampa, Florida this 1st day of May, 1985.

/s/
WILLIAM J. CASTAGNA
UNITED STATES DISTRICT JUDGE

Copies to
Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

RICHARD T. DORMAN,

Petitioner,

vs. Case No. 79-1264-Civ-T-15
and 79-1290-Civ-T-15

LOUIE L. WAINWRIGHT,
Secretary, Department of
Corrections, State of Florida,

Defendant.

ORDER

This cause came on for consideration of a petition for writ of habeas corpus filed by a state prisoner, Richard Dorman, pro se, in forma pauperis. The matter was considered by the United States Magistrate, pursuant to the general order of assignment, who filed his Report and Recommendation recommending that the Petition be denied. The Petitioner timely filed written objections.

It has now come to the Court's attention, however, that Petitioner was released by the state of Florida on January 13, 1984 at the end of his sentence, with no probation. There is

therefore now a question as to mootness. Notwithstanding his release, whether or not this action is now moot depends upon whether the Petitioner will suffer "collateral consequences" from his conviction. See Carafas v. LaVallee, 391 U.S. 234, 239 (1968). Cf. Whitley v. Miller, F.2d ___, slip op. at 1303 (11th Cir. Dec. 26, 1984). There is simply no basis on the record to conclude that the Petitioner will not continue to suffer collateral consequences from his felony conviction. At a minimum, Florida's recidivist statute, see Fla. Stat. § 775.084 (1983), raises the possibility of adverse consequences from having this felony conviction on Petitioner's record. Other collateral consequences will also follow.[1/] And even if the Petitioner's civil rights have been restored, see Fla. Stat. § 944.292; §940.05, this Petitioner has been attempting to vindicate his rights since 1979. As the Carafas court stated, "partly because of the inevitable delays in our court process...[Petitioner] should not be thwarted now...simply because the path has been so long that he served his sentence." 391 U.S. 240. Mootness does not bar this action.

As an initial basis of attack on this action, the Defendant contends that because the Petitioner failed to follow through with his direct appeal, which was voluntarily dismissed, he knowingly and intentionally bypassed his state remedy of direct appeal.[2/] Although this matter was briefed by the parties, the Magistrate did not reach the issue in his Report and Recommendation, and the Court can only assume that the Magistrate determined the issue in the Petitioner's favor.

Based upon the record before this Court, the Defendant has not demonstrated that Petitioner's dismissal of his appeal was an "intentional relinquishment or abandonment of a known right or privilege." See Fay v. Noia, 372 U.S. 391, 439 (1963).[3/] The evidence indicates that the appeal was dismissed based upon the incorrect advice of a jailed former judge who told him that his contentions could be raised in a post-conviction motion under Fla.R.Crim.P. 3.850. The Petitioner gained no "tactical advantage" from his dismissal, see Buckelew v. United States, 575 F.2d 515 (5th Cir. 1978), as the trial court's express ground for denying the 3.850 motion was the Petitioner's

failure to raise the issues presented in a direct appeal. In short, the record before this Court makes clear that the Petitioner did not make a knowing and informed decision to bypass review under state procedures, but instead acted upon the mistaken belief that he was following an alternate method of review in the state courts.

As to the merits of his claims, the Petitioner raises five grounds of attack against his conviction on state grand larceny charges. Finding no basis for relief as to the first four contentions, the Court notes that the Petitioner alleges he was denied his right to proceed pro se at trial. The Magistrate found on this issue as follows:

> Petitioner's final claim, denial of his right to represent himself at trial, is not borne out by the record. Petitioner's efforts to have appointed counsel withdraw do not contain a clear request to represent himself. At no time, at the trial court level, did he waive his right to appointed counsel. In his letter to the trial judge, Petitioner requested that the public defender be relieved of representation but did not express a desire to represent himself. (Pet.Ex. #1). Petitioner has failed to satisfy his burden of proof that he was forced to accept representation of counsel or

> that he voluntarily and intelligently elected to defend himself without counsel, facts necessary to establish a denial of his constitutional right to represent himself at trial under the teachings of Faretta v. California, 422 U.S. 806 (1974).

This interpretation of the occurrences in state court simply is not realistic.

Every reasonable implication that can be taken from the Petitioner's actions was that he wanted the public defender's office released and that he wanted to take over his representation for himself. He even went so far as to cite Faretta v. California, which held that a defendant has a constitutional right to defend himself and to not be forced to go to trial with counsel if he so desires. Here, Petitioner Dorman attempted to file pro se motions, a pro se appeal, and requested copies of law books and rules from the trial judge for himself.

The Magistrate's Report is based upon the factual determination that although the Petitioner continually asked to have the public defender removed, he never explicitly stated that he wanted to represent himself. In fact, only one

factor even conceivably supports this finding. The Petitioner's eventual trial counsel (Tinneman) (sic) stated that although the Petitioner had reservations about his representation, he was never actually discharged. Therefore, it is possible to argue that although he was appointed, because Tinneman (sic) was not with the public defender's office, it can be implied that the Petitioner only wanted to represent himself as long as the other option was the public defender's office.

Such conjecture is not justified on this record. The Petitioner clearly undertook every reasonable effort to take over his own representation. The fact that Tinneman (sic) was not ever discharged and was not a public defender does not negate the fact that the state court trial judge continually denied Petitioner's clear desire to represent himself. This Court finds that the Petitioner clearly invoked his right of self-representation sufficient to comply with the teachings of Faretta v. California and that the trial court denied him that significant constitutional right. Accordingly it is

ORDERED:

1. The Court declines to adopt the Magistrate's Report and Recommendation.

2. The Petitioner's Petition for Writ of Habeas Corpus is granted and the writ shall issue contemporaneously with this Order.

3. Each party to bear their own costs.

DONE and ORDERED at Tampa, Floirda (sic) this 1st day of May, 1985.

/s/
WILLIAM J. CASTAGNA
UNITED STATES DISTRICT JUDGE

Copies to
Counsel of Record

FOOTNOTES

1. See e.g. Fla. Stat. § 561.15 (no person convicted of a felony in the last 15 years may receive a liquor license); id. § 733.303 (may not act as a personal representative); id. § 943.13 (will not qualify for certain state employment).

2. As the Defendant concedes, this is not a question of exhaustion of state remedies. Exhaustion is not at issue because there is nothing left that the Petitioner can do in state court as to his claims. See Defendant's Memorandum of Law In Support of Motion to Dismiss, filed October 31, 1980, at 2.

3. The Fay court set the standard for finding "bypass" as follows:

> If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forwent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits. . . .

372 U.S. at 439 (emphasis added)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

RICHARD T. DORMAN,

Petitioner,

vs. CASE NOS.79-1264-Civ.-T-WC
and 79-1290 Civ.-T-WC

LOUIE L. WAINWRIGHT,
Secretary, Department of
Corrections, State of Florida,

Respondent.

REPORT AND RECOMMENDATION

THIS CAUSE came on for consideration of a petition for writ of habeas corpus filed by a state prisoner, RICHARD T. DORMAN, pro se, in forma pauperis. Counsel was appointed to represent the indigent petitioner, a pre-evidentiary hearing stipulation was filed, and an evidentiary hearing was held.

Petitioner alleges the following grounds in support of his aspplication (sic) for habeas corpus relief:

(1) Unconstitutional identification of petitioner by the victim;

(2) Denial of fair trial due to prejudice of the trial judge;

(3) Insufficient evidence to support conviction as charged in information;

(4) Denial of due process and equal protection by the failure to try petitioner within 180 days of his arrest pursuant to Fla. R. Crim. P. 3.191.; and

(5) Denial of petitioner's right to proceed pro se.

During the course of the proceedings in this Court the petitioner escaped from custody of Respondent and thereafter was returned to custody. Petitioner's motion to dismiss the petition in this Court was denied by Order entered June 18, 1983.

Petitioner's first claim has no basis in fact. Petitioner asserts that the out-of-court identification of petitioner by the victim was improperly suggestive. The trial transcript discloses that the victim was well known by the petitioner prior to the crime. (Tr. 53-65).

As to his second claim, prejudice of the trial judge, petitioner's factual claim relates solely to his dissatisfaction with the judge's decisions. (Ev.Hrng. 53-54). Even if Petitioner's factual assertions are true, the facts are insufficient to form a basis for disquali-

fication of the judge nor do the facts asserted establish a basis for habeas corpus relief in this Court.

As to Petitioner's third claim, a review of the trial transcript discloses that sufficient evidence, including the testimony of the victim (R.53-65), was introduced against petitioner to pass constitutional muster under the teachings of Jackson v. Virginia, 443 U.S. 307 (1979).

Petitioner's fourth claim raises only a state speedy trial issue. Petitioner presented no facts which would establish a denial of his speedy trial rights under the constitution.

Petitioner's final claim, denial of his right to represent himself at trial, is not borne out by the record. Petitioner's efforts to have appointed counsel withdraw do not contain a clear request to represent himself. At no time, at the trial court level, did he waive his right to appointed counsel. In his letter to the trial judge, Petitioner requested that the public defender be relieved of representation but did not express a desire to represent himself. (Pet. Ex. #1). Petitioner has failed to satisfy his

burden of proof that he was forced to accept representation of counsel or that he voluntarily and intelligently elected to defend himself without counsel, facts necessary to establish a denial of his constitutional right to represent himself at trial under the teachings of Faraetta v. California, (sic) 422 U.S. 806 (1974).

Accordingly, I recommend that the petition for writ of habeas corpus be denied, this 31st day of October, 1984.

/s/
PAUL GAME, JR.
UNITED STATES MAGISTRATE

NOTE: This matter was referred to the United States Magistrate pursuant to the Standing Order of this Court and Local Rule 6.01(c)(17). Failure to file written objections to the proposed findings and recommendations contained in this report within ten (10) days from the date of its service shall bar an aggrieved party from attacking the factual findings on appeal. 28 USC 636(b)(1). Local Rule 6.02; Nettles v. Wainwright, 677 F.2d 404 (5th Cir. 1982).

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Supreme Court, U.S.
FILED
FEB 6 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1986

NO. 86-1171

LOUIE L. WAINWRIGHT, etc., et al.,

Petitioners,

v.

RICHARD T. DORMAN,

Respondent.

/

RESPONSE TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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RULES

Supreme Court Rules, Rule 17 1

STATEMENT REGARDING RECORD REFERENCE

Whenever used herein, the symbol "A" followed by a pagination number will refer to the Appendix of Petitioner's Petition for Certiorari. (Example: A-1).

STATEMENT OF THE CASE

Respondent cannot accept Petitioners' Statement of the Case, as it omits significant aspects of the procedural history of this case and presents, at least in some respects, an argumentative version of the procedural history.

Respondent relies upon and expressly adopts that portion of the decision below setting forth the procedural history of this case, including the FACTS AND PROCEDURAL HISTORY portion of the opinion. (A-10). This portion of the decision below lists chronologically the significant filings and rulings in the lower courts and traces the procedural history of Respondent's thwarted attempts to exercise his constitutional right to represent himself. (A-10, 11-20). Faretta v. California, 422 U.S. 806, 95 S.Ct 2525, 45 L.Ed.2d 562 (1975).

ARGUMENT

Respondent, RICHARD T. DORMAN, responds to LOUIE L. WAINWRIGHT's, etc., et al., Petition for Writ of Certiorari as follows:

Petitioner, LOUIE L. WAINWRIGHT, Secretary, FLORIDA DEPARTMENT OF CORRECTIONS (hereinafter referred to as "PETITIONER"), seeks a Writ of Certiorari from this Honorable Court to review the Eleventh Circuit's decision in Dorman v. Wainwright, 798 F.2d 1358 (11th Cir. 1986). PETITIONER has failed to demonstrate that this case is of great public importance and has failed to establish that the Eleventh Circuit's decision expressly conflicts with decisions rendered by this Court or other Circuit Courts of Appeal. Supreme Court Rules, Rule 17.

In seeking review, PETITIONER has limited his plea to two primary concerns.[1] First, PETITIONER contends that this Court should grant review because of the impact of the Eleventh Circuit's decision upon the finality of decisions and the "strained" relationship between state and federal courts. Secondly, PETITIONER claims that the Eleventh Circuit's decision conflicts with decisions of the Supreme Court which analyze both "procedural default" and "deliberate bypass." (Petitioner's brief at p. 12).

THE ELEVENTH CIRCUIT'S DECISION DOES NOT HAVE A GREAT IMPACT UPON FINALITY OF STATE CRIMINAL PROCEEDINGS.

The impact of the Eleventh Circuit's decision upon the issue of finality, as well as state and federal court relations, is and will be minimal, particularly in light of the facts and circum-

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[1] Petitioner does not challenge the Eleventh Circuit's finding that " ... Dorman's constitutional right to proceed pro se was unquestionably denied." (A-52). As concluded by the Eleventh Circuit panel: "Finding a grave violation of Petitioner's constitutional right, we affirm." (A-10).

stances surrounding Dorman's procedural default. Dorman was convicted of grand theft. His case has languished in the judicial system almost without interruption since 1978. He has long since served the state sentence resulting from his conviction (A-25). The peculiar history of Dorman's attempts to represent himself and the repeated denials by a state court system apparently oblivious to this most fundamental constitutional right suggests that this case can best be characterized as a classic example of an appropriate implementation of the "cause" and "prejudice" standard of Wainwright v. Sykes, 433 U.S. 72 (1977).

The Eleventh Circuit, in a well reasoned and articulate decision, came to a most startling conclusion, which underscores the speciousness of Petitioner's arguments. Whereas, on the one hand, Petitioner argues that the Eleventh Circuit's decision "works an especially hard strain on the relationship between the state and federal courts," apparently suggesting that federal review of alleged constitutional deprivations intrude upon what should be exclusively a state court function, Petitioner gives mere lip service to what the Eleventh Circuit found to be the cause of Dorman's procedural default, "an unreasonable delay in the preparation of his trial transcript." (A-13, 14; 46).

This is not a case where a defendant represented by counsel failed to raise a claim on appeal because counsel, as a matter of tactics, determined not to include that issue on appeal. See: Smith v. Murray, 477 U.S. _____, 106 S.Ct. _____, 91 L.Ed.2d 434 (1986). Nor it is a case in which counsel deliberately withheld a constitutional issue in hopes of obtaining relief in the federal courts via sandbagging. This is a case in which a pro se litigant, faced with state occasioned delay in the preparation of his trial transcript, dismissed his appeal "without prejudice," apparently in an attempt to achieve a speedier review of his conviction, erroneously believing that he could refile it at a later time.

As the Eleventh Circuit acknowleged, Respondent, when faced with the inordinate delay in the preparation of the transcript,

began corresponding with the Clerk of the Court, inquiring as to the status of the transcript and ultimately filed a pro se Motion to Expedite preparation of the transcript and a "Petition for Remedial Writ," in an attempt to get the trial transcribed. (A-14, 16). Contrary to Petitioner's assertion, Respondent was patient. (Petition at p. 15). Only after his efforts proved unsuccessful did Petitioner dismiss the appeal and pursue collateral relief in the state court. (A-46).

It is this premise, the state's failure to provide a trial transcript to Respondent in a timely fashion in order to allow prosecution of the appeal, on which the Eleventh Circuit decided the issues presented:

> The state's failure to provide Dorman with a trial transcript within a reasonable time to perfect his appeal constitutes an external factor out of Dorman's control that suffices as "cause" for the dismissal of the direct appeal. (A-51).

It is clear from the decision below that the Eleventh Circuit correctly applied the "cause" and "prejudice" analysis to the alleged procedural default, consistent with Wainwright v. Sykes, supra and Murray v. Carrier, supra. (A-47).

In Question II presented by Petitioner, Petitioner suggests that the "Court of Appeals erroneously applied the voluntary relinquishment of a known right or privilege" standard in determining whether Petitioner had "deliberately bypassed" an available state remedy. (Petition at p. i). This question, however, is no longer an issue in this case. The Eleventh Circuit, expressly recognizing the holding in Murray v. Carrier, supra, applied the "cause and prejudice" doctrine to Respondent's alleged procedural default. (A-47). Although admittedly the Eleventh Circuit did address the "intentional relinquishment or abandonment of a known right or privilege" standard in discussing the deliberate bypass rule (A-42, 43), this was obviously in recognition of the implicit viability of that standard as interpreted in Fay v. Noia. See: Wainwright v. Sykes, 433 U.S. at 88 n.12. Also, it must be remembered that this case came to

the federal court in 1979, long before application of the "cause and prejudice" doctrine to appellate procedural defaults. Clearly, the United States Magistrate and counsel, in analyzing the procedural issues of this case, labored under the dichotomy of two distinctly different standards and all attempted to address the case on both standards. To be sure, the District Court, in response to Petitioner's Motion for New Trial, specifically addressed the issue of procedural default in the context of "cause and prejudice," recognizing that Wainwright v. Sykes had narrowed the "deliberate bypass" formulation of Fay v. Noia. (A-53). It should be noted that the District Court determined the issues prior to pronoucement of the decision in Murray v. Carrier, supra.

In any event, the Eleventh Circuit clearly recognized and followed the reasoning of Murray v. Carrier. It did not, notwithstanding Petitioner's Question II, apply the "voluntary relinquishment of a known right or privilege" formulation of Johnson v. Zerbst, 304 U.S. 458 (1938). Accordingly, the issue is a non issue.

The speciousness of Petitioner's argument is perhaps best evidenced by the inconsistency of its argument before this Court and its argument before the Eleventh Circuit. In the instant petition, Petitioner argues that the Eleventh Circuit erroneously applied the Johnson v. Zerbst "voluntary relinquishment" standard. (Petition at p. 17). Yet, before the Eleventh Circuit, Petitioner, at least in the view of that panel, urged "that the District Court wrongfully used this doctrine (cause and prejudice) as a means of circumventing the deliberate bypass standard of Fay v. Noia." (A-47).

THE QUESTIONS PRESENTED DO NOT INVOLVE QUESTIONS OF GREAT IMPORTANCE IN THE ADMINISTRATION OF HABEAS CORPUS PROCEEDINGS IN FEDERAL COURT.

Simply put, the questions presented by Petitioner are not sufficiently important to warrant review by this Court. The

decision below turns on its own facts and will affect few other cases and litigants. The Eleventh Circuit correctly applied the "cause and prejudice" doctrine, in accordance with Wainwright v. Sykes and Murray v. Carrier, supra. The court below fully considered and correctly decided the issues. The allegedly conflicting decisions are distinguishable on their own facts.

Respondent readily concedes that finality of state criminal proceedings is a legitimate state and federal interest. Murray v. Carrier, supra. Admittedly the decision below has some impact upon finality, as do all federal appellate decisions which address alleged deprivations of federal constitutional rights. However, what little impact this case may have is simply to confirm that state occasioned interference or delay with the progress of a criminal defendant's appeal will satisfy the "cause" prong of the cause and prejudice doctrine. Federal review of a constitutional claim which otherwise would have been lost by virtue of the procedural default will be justified.

Finality, in the context of state and federal relations and the vindication by federal courts of state deprived constitutional rights, necessarily begins with the correct application of federal constitutional principles to the administration of criminal justice by our state courts. Finality, therefore, is and will be pre-determined by the state court's recognition of and protection of fundamental constitutional rights. Deprivation of those rights undermines finality. Particularly, where as here, state occasioned interference or delay causes a procedural default, the state should not be heard to complain when the federal court, through its equitable exercise of the authority granted by the GREAT WRIT, steps in and vindicates federal constitutional deprivation. As the Eleventh Circuit observed in this case:

> "Dorman presented the state with ample opportunities to address his constitutional claims, especially that of the right to self-representation. Having failed to even address the question, the state cannot now complain about the federal court's exercise of its power over the state in vindicating constitutional guarantees." (A-46).

The state's failure to provide Dorman with a trial transcript within a reasonable time constitutes an external factor out of Dorman's control that suffices as "cause" for the dismissal of the direct appeal. (A-51).

Where, as here, the state court has been given the opportunity to address and resolve the constitutional issues, the interest of finality and comity have been satisfied. Murray v. Carrier, supra. "From the outset of the prosecution, Dorman asserted his desire to proceed pro se, which was continually denied." (A-10). All of Dorman's pro se pre-trial motions were "either denied or ignored." (A-11). His specific request to represent himself was "expressly denied" by the trial judge. (A-11). There was a "constant summary denial of his requests ... to proceed pro se." (A-35).

While Petitioner complains that Dorman, in dismissing his direct appeal, deprived the state court of its right to adjudicate the issue of denial of his right to represent himself, it cannot be denied that the trial court and the appellate court had ample opportunities to address, if they had been inclined to, this fundamental constitutional right. (A-46). For example, Dorman filed a pro se motion to disqualify the trial judge on grounds of prejudice against him because the court would not respond to Dorman's pro se motions or allow him to proceed pro se, citing Faretta v. California, 422 U.S. 806 (1975). (A-12). Thereafter, Dorman filed an interlocutory appeal, citing Faretta and complaining of the trial court's refusal to discharge the public defender. (A-12). Without comment, the appellate court denied this appeal. (A-13). It cannot be said, therefore, that Dorman did not afford the state courts the first opportunity to address this important constitutional issue. It is apparent, therefore, that the same state judicial system which now complains of lack of finality and federal intervention, long ago relinquished the opportunity to resolve the issue.

THE QUESTIONS PRESENTED WILL NOT HAVE GREAT IMPACT ON THE RELATIONSHIP BETWEEN STATE AND FEDERAL COURTS

Neither the decision below nor the questions raised by Petitioner will have great impact on the relationships between state and federal courts, whether they be strained or not. The decision below turns on its own peculiar facts. The case presents merely an example of the proper application of the standards set forth in Wainwright v. Sykes, as interpreted by Murray v. Carrier, supra, and Engle v. Isaac, 456 U.S. 107, 71 L.Ed.2d 783, 102 S.Ct 1558 (1982). The Eleventh Circuit correctly found, in accordance with Murray v. Carrier, supra, that the state's failure to provide Dorman with a trial transcript within a reasonable time constituted an objective external factor out of Dorman's control that sufficed as the "cause" for his dismissal of the direct appeal. (A-51).

In sum, the Eleventh Circuit properly applied correct Supreme Court precedent and controlling law to the facts of this case. It neither deviated from nor took issue with controlling standards as pronounced by this Court. The facts in this case are unique and are not likely to repeat themselves. The questions raised by Petitioner have, quite simply, been addressed and resolved by the decisions cited herein. The rules of law are clear and were properly applied in the decision below. While application of those rules to the facts in this case may have resulted in a different result from the cases cited, that merely underscores that these allegedly conflicting decisions are distinguishable on their own facts.

Petitioner suggests that the questions presented involve issues that have great impact on the "strained" relationships between state and federal courts. (Petition at p. 12). Any "strain" worked on the relationship between the state and federal courts by the decision below is the result of a state criminal justice system which was oblivious to the constitutional right of self-representation expressly invoked by Respondent. It is ironic that the same state system which ignored Respondent's repeated requests to proceed pro se now, through its state official,

complains that federal vindication of that same constitutional right somehow "works an especially hard strain on the relationship between state and federal courts." (Petition at p. 13).

THE LOWER COURT'S DECISION DOES NOT DIRECTLY OR EXPRESSLY CONFLICT WITH DECISIONS OF THE SUPREME COURT OR OTHER CIRCUIT COURTS.

The decision below does not conflict with Murray v. Carrier or Smith v. Murray. The Eleventh Circuit correctly applied Murray v. Carrier, in recognizing that the cause and prejudice doctrine applies to all procedural defaults regardless of what stage of the proceeding, trial or appellate, the default at issue occurs. (A-50). In accordance with Murray v. Carrier, the court below properly identified an objective factor external to the defense which constituted "cause" for Dorman's procedural default. (A-51). To be sure, Murray v. Carrier recognizes that "some interference by officials" can, in certain instances, constitute cause under this doctrine. 91 L.Ed.2d at p. 408.

Similarly, the decision below does not conflict with Smith v. Murray, 91 L.Ed.2d 434 (1986). In that case, appellate counsel failed to pursue a particular issue on appeal which, given that he raised thirteen (13) separate claims in his brief, constituted a deliberate tactical choice which could not, under the circumstances of that case, satisfy the cause prong of the cause and prejudice doctrine. Petitioner correctly quotes from that decision in which this Court stated that "a deliberate, tactical decision not to pursue a particular claim is the very antithesis of the kind of circumstance that will warrant excusing a defendant's failure to adhere to a state's legitimate rule for the fair and orderly disposition of its criminal cases." (Petition at p. 16). However, in Smith v. Murray, it was clear that the issue which counsel elected not to include in the appeal had been litigated in various state courts. As counsel in that case explained, he "consciously decided not to pursue that claim," after determining that present law would not support it.

Counsel's tactical decision obviously did not constitute ineffective assistance of counsel and therefore could not constitute "cause" for the procedural default.

Smith v. Murray is distinguishable from this case on its facts. There, the defendant was represented by counsel who made an informed, although unfortunate tactical decision. Here, a pro se defendant made an uninformed, albeit deliberate decision to forego his delayed appeal and pursue collateral relief with the hope of a speedier review of his conviction. Whereas in Smith v. Murray, the clear inference was that counsel elected to abandon a particular issue on appeal, here there is every indication that Dorman never intended to drop his complaint that he was deprived of his constitutional right to represent himself. Again, there is no conflict between the decision below and Smith v. Murray. The facts are different and the result was different. However, the same principles of law were applied to facts which are clearly distinguishable.

Finally, there is no conflict between the decision below and this Court's decision in Engle v. Isaac, supra. In the decision below, again, the Eleventh Circuit applied the same standards as dictated by the Supreme Court in Engle v. Isaac. The defendant Isaac was represented by counsel, who failed to object to a jury instruction and who sought redress in the federal court based upon a subsequent successful constitutional challenge to the instruction. The respondents in that case sought to establish the "cause" prong of the cause and prejudice doctrine by pointing to counsel's ignorance of the constitutional issue and the purported futility of raising the issue in state court. Finding that in the circumstances of the case, counsel's conduct did not constitute cause, this Court determined the claims to be barred. Here, however, Dorman did raise the issue repeatedly before the trial court and even raised the issue before the appellate court by way of interlocutory appeal. (A-11, 12). Accordingly, this case does not present a situation, as did Engle, where the deprivation of constitutional rights was never raised.

Contrary to the urgings of Petitioner, the decision below is in harmony, and not in conflict with the principles of finality and comity as embraced by this Court in Wainwright v. Sykes, Engle v. Isaac and Murray v. Carrier. The State of Florida had ample opportunity to clean its own house and vindicate its deprivation of Respondent's constitutional right to proceed pro se.

Murch v. Mottram, 409 U.S. 42 (1972) likewise does not afford a conflict which would justify review by this Court. In Murch, counsel misinterpreted a state procedural rule, resulting in a waiver of certain claims. In that case, counsel was specifically warned by the trial court of the risk he ran in declining to assert his claim but, "nonetheless chose to run that risk." 409 U.S. at 47. Clearly, a foundation for waiver was established when counsel assumed the risk after specific warning. In the decision below, no such warning was available to Respondent.

Contrary to the argument of Petitioner, Murch v. Mottram did not address the so called "tactical advantage" generally found to exist when deliberate bypass is established. (Petition at p. 18, 19). In any event, the Eleventh Circuit in dicta, merely traced the rationale underlying the deliberate bypass doctrine as it has evolved within that circuit when it spoke of the so called "tactical advantage" aspect of the deliberate bypass doctrine. (A-42). However, as Petitioner neglects to point out, the Eleventh Circuit did not, as a condition to its deliberate bypass determination, require that a habeas respondent demonstrate that the petitioner gain a tactial advantage.

Admittedly, Murch denounces the consideration of the subjective intent of a petitioner in determining whether a deliberate bypass occurred. 409 U.S. at 46. However, the Eleventh Circuit did not rely upon Dorman's subjective intent in dismissing his appeal. It relied upon the external objective factor, "the state's failure to provide Dorman with a trial transcript within a reasonable time to perfect his appeal ....," in assessing whether the procedural default could be excused. (A-51).

CONCLUSION

Respondent respectfully suggests that the questions presented are not important enough to warrant review by this Court. The decision below turns on its own facts and will affect few, if any, other cases and litigants. The Eleventh Circuit correctly applied controlling Supreme Court precedent. It fully considered and correctly decided the issues in accordance with that precedent. Its decision is in harmony with and not in conflict with controlling decisions of this Court. Petitioner has failed to demonstrate that the decision below involves questions of great importance in the administration of habeas corpus proceedings in federal court, that those questions involve issues which have great impact on the relationships between state and federal courts or that there is conflict between the decision below and controlling precedent or decisions of other circuits.

Respondent's odyssey began in 1978 and has wandered through state and federal courts for nearly ten (10) years. Petitioner pays great honor to the doctrine of finality. Yet, it is finality which suggests that the Petition for Certiorari be denied. Respondent has served his time (A-25). His only recourse is a second trial with a hope of vindicating himself long after the prejudice resulting from his constitutional deprivation has been occasioned.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I, JAMES D. WHITTEMORE, Counsel for Respondent and a member of the bar of this Court, hereby certify that on the 27th day of February, I served a true and correct copy of Respondent's Response to Petitioner's Petition for Writ of Certiorari on Davis G. Anderson, Assistant Attorney General, State of Florida, 1313 Tampa Street, Suite 804, Park Trammell Building, Tampa, Florida 33602, by depositing same in the United States Post Office or mailbox, with first class postage, pre-paid. All parties required to be served have been served.

JAMES D. WHITTEMORE, ESQUIRE